6 - 26338

HARRY L. MOOAR,
Plaintiff in Error,

vs.

CHARLES H. RATHMANN,
Defendant in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

225 I.A. 641

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse an order or decree of the Circuit court of Cook County, entered March 31, 1920, sustaining defendant's general and special demurrer to complainant's bill for specific performance of a written contract for the exchange of certain real estate and dismissing the bill for want of equity. It is recited in the order that complainant did not appear to defend his bill and that no motion was made to file an amended bill. Defendant in error has not filed any printed brief or argument in this appellate court.

The bill alleges that on March 8, 1919, at Chicago, Illinois, the parties entered into the contract, which is set out in haec verba in the bill. It is provided in the contract that defendant, as first party, in consideration of the covenants thereinafter made by complainant, as second party, and "upon the performance" by complainant of said covenants, agrees to convey to complainant by general warranty deed certain described land and buildings thereon in Chicago, subject to certain mentioned encumbrances; that complainant agrees to convey to defendant by general warranty deed certain described farm lands in Millard County, State of Utah, together with the improvements thereon, including water rights and oil rights, and all machinery, tools and implements, but subject to a certain mentioned first mortgage; and that defendant further agrees to give to complainant at the date of the delivery of the deeds $7000 in cash, to be

6 - 32558

HARRY L. MOSAR,
Plaintiff in Error,

vs.

CHARLES N. HAUSBARK,
Defendant in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

225 I.A. 641

MR. PRESIDING JUSTICE SCHLICK DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse an order or decree of the Circuit Court of Cook County, entered March 21, 1930, sustaining defendant's general and special demurrer to complainant's bill for specific performance of a written contract for the exchange of certain real estate and dismissing the bill for want of equity. It is recited in the order that complainant did not appear to defend his bill and that no motion was made to file an amended bill. Defendant in error has not filed any printed brief or argument in this appellate court.

The bill alleges that on March 8, 1919, at Chicago, Illinois, the parties entered into the contract, which is set out in haec verba in the bill. It is provided in the contract that defendant, as first party, in consideration of the covenants thereinafter made by complainant, as second party, and "upon the performance" by complainant of said covenants, agrees to convey to complainant by general warranty deed certain described land and buildings thereon in Chicago, subject to certain mentioned encumbrances; that complainant agrees to convey to defendant by general warranty deed certain described farm lands in Millard County, State of Utah, together with the improvements thereon, including water rights and oil rights, and all machinery, tools and implements, but subject to a certain mentioned first mortgage; and that defendant further agrees to give to complainant at the date of the delivery of the deeds $7000 in cash, to be

secured by a second mortgage on said farm lands. The instrument contains the following clause:

> "This contract is signed by C. H. Rathmann subject to inspection of said farm within 10 days from date hereof and acceptance or rejectment of the ranch and terms of this contract in writing at the expiration of said 10 days."

The instrument also contains mutual covenants and agreements inter alia that each party is to furnish the other within a reasonable time from the date of the instrument a complete merchantable abstract of title, or merchantable copy thereof, brought down to cover said date, or merchantable title guaranty policy made by the Chicago Title & Trust Co., showing good and sufficient title at said date in the respective parties to the properties hereby agreed to be conveyed by them. that brokerage fees or commissions shall be paid to a certain named broker by the respective parties as agreed between them and said broker; that "all deeds shall be passed and this negotiation closed", at the office of said broker, "within five days after the titles have been found good;" and that time is declared to be of the essence of the agreement and of all the conditions thereof.

The bill then alleges that complainant is now, and was at the time of the execution of the contract, able, willing and ready to perform all that he was required to do under the terms thereof, but that defendant has failed and refused, and still refuses, to perform the acts that he was required to do by said contract; that on May 13, 1919, at Chicago, complainant did in writing and in person tender to defendant a good and sufficient warranty deed of the premises described in the contract as being owned by him, and in writing made a demand upon said defendant for the delivery to complainant of a good and sufficient warranty deed to the premises owned by defendant and as described in the contract; that complainant is able and anxious at all times to perform each and every part of the contract that he is legally bound to do; and

secured by a second mortgage on said farm lands. The instrument contains the following clause:

> "This contract is signed by G. H. Bateman subject to inspection of said farm within 10 days from date hereof and acceptance or rejection of the terms and terms of this contract in writing at the expiration of said 10 days."

The instrument also contains usual covenants and agreements under oath that each party is to furnish the other within a reasonable time from the date of the instrument a complete merchantable abstract of title, or merchantable copy thereof, brought down to cover such date, or marketable title guaranty policy made by the Chicago Title & Trust Co., showing good and sufficient title as said date in the respective parties to the property mutually agreed to be conveyed by them, that brokerage fees or commissions shall be paid to a certain named broker by the respective parties as agreed between them and said broker; that "all deeds shall be passed and this negotiation closed", at the office of said broker, "within five days after the titles have been found good;" and that time is declared to be of the essence of the agreement and of all the conditions thereof.

The bill then alleges that complainant is now, and was at the time of the execution of the contract, able, willing and ready to perform all that he was required to do under the terms thereof, but that defendant has failed and refused, and still refuses, to perform the acts that he was required to do by said contract; that on May 13, 1919, at Chicago, complainant did in writing and in person tender to defendant a good and sufficient warranty deed of the premises described in the contract as being owned by him, and in writing made a demand upon said defendant for the delivery to complainant of a good and sufficient warranty deed to the premises owned by defendant and as described in the contract; that complainant is able and ready at all times to perform each and every part of the contract that he is legally bound to do; and

that he is without adequate remedy at law and asks that a court of equity decree that defendant specifically perform his portion of said contract, complainant tendering and offering to perform any and all things required of him thereunder. The prayer of the bill is for a specific performance of the contract, a receiver and an injunction.

It will be noticed that, as to the clause of the contract relative to defendant making an inspection of complainant's farm or ranch, complainant makes no allegations in his bill whatsoever. He does not allege that defendant did or did not make such inspection within the 10 days mentioned, or that at the expiration of said 10 days defendant accepted the ranch and the terms of the contract, or that he did not at said expiration in writing reject the ranch and the terms of the contract. Furthermore it does not appear from any allegation in the bill that complainant within a reasonable time from the date of the contract furnished defendant, as he was required to do, with a merchantable abstract of title, or merchantable copy, brought down to the date of the contract, or a proper title guaranty policy, showing a good and sufficient title to said farm or ranch in him.

We are of the opinion that the court was fully justified in sustaining defendant's demurrer to the bill and, under the circumstances recited in the order, in dismissing the bill for want of equity. The decree is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

18 - 26768

HELEN CHLUMSKY,
Defendant in Error,

vs.

FRANCES CHLUMSKY,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

225 I.A. 641

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, hereinafter referred to as defendant, seeks by this writ to reverse a judgment for $750, entered against her after verdict by the Circuit Court of Cook County, in an action for slander and alienation of affections. Defendant is the mother of plaintiff's husband.

The action was commenced on September 4, 1915. Plaintiff's declaration consisted of three counts. The first count alleged in substance that, before and at the time of the happening of the grievances complained of, plaintiff was a married woman living with her husband, was pregnant with child by him, and had always been a virtuous and chaste woman and of good name and reputation, etc.; that defendant, contriving to injure plaintiff, etc., on August 22, 1915, in Chicago, in said county, in a certain discourse which defendant then and there had of and concerning plaintiff and in the presence and hearing of divers persons who understood the Bohemian language, falsely and maliciously spoke and published of and concerning plaintiff certain false, scandalous and defamatory words, in said Bohemian language (words set out in that language); that said words signified and meant in the English language, as follows: "'That is not her husband's child' (meaning to insinuate that the child with which plaintiff was pregnant was conceived in adu ltery); 'she used to go with her mother to picnics and who knows where she picked it up' (meaning to convey that plaintiff had committed adultery and had been unchaste and unfaithful

to her husband); 'it' (meaning said unborn child) 'does not belong to him' (meaning said plaintiff's husband"; and that by means thereof plaintiff has been greatly injured and damaged,etc.

The second count, containing similar preliminary averments, charged in substance that defendant, on June 10, 1915, at Chicago, in said county, in a certain discourse which defendant then and there had with plaintiff's said husband of and concerning plaintiff, and in the presence and hearing of divers persons who understood the Bohemian language, falsely and maliciously spoke and published of and concerning plaintiff certain false, scandalous and defamatory words, in said Bohemian language (words set out in that language); that said words signified and meant in the English language, as follows: "'When these letters' (meaning certain letters which plaintiff was receiving from her friends and family in Europe) 'in German, take them' (meaning said letters) 'from her' (meaning plaintiff) 'and tear them up' (meaning said letters); 'they' (meaning said letters) 'are from a lover in Bohemia' (meaning to insinuate that plaintiff has a lover in Bohemia with whom she was corresponding)"; and that, by means of the committing of said grievances by the defendant, plaintiff has been "greatly injured in her good name and reputation, and shunned, avoided, neglected and deserted by her husband, and brought into public scandal and disgrace," etc.

The third count, which was the only one concerning the alleged alienation of the affections of plaintiff's said husband, alleged in substance that, at and before the happening of the grievances complained of in said count, plaintiff was married to defendant's son, was living with him as his wife and was faithfully and obediently performing her duties as such wife; that defendant, well knowing the premises but intending to injure plaintiff, etc., did, on various occasions between June 1, 1915, and the commencement of this suit, wrongfully and injuriously "entice and persuade the

said husband of plaintiff to neglect plaintiff and to neglect and provide for her support, and finally to depart and separate himself from plaintiff and from the dwelling house of plaintiff without leave of plaintiff"; and that thereby plaintiff has been deprived, etc., and greatly damaged, etc.

On the trial plaintiff and three witnesses testified in her behalf. At the conclusion of plaintiff's evidence in chief defendant moved for a directed verdict in her favor and also moved that the jury be instructed to disregard the first count of plaintiff's declaration, but both motions were denied. Thereupon defendant and five witnesses in her behalf gave testimony, and then certain witnesses in behalf of plaintiff were heard in rebuttal. At the close of all the evidence defendant renewed her motion for a directed verdict in her favor but the motion was again denied. Defendant then made three separate motions that the jury be instructed to return a verdict in defendant's favor on the first, second and third counts respectively, but these motions were all denied. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at the sum of $750, and the judgment followed.

It appears from the undisputed evidence that plaintiff married defendant's son, Joseph Chlumsky, on February 21, 1915; that they conducted a small grocery store at No. 2616 Cortez street, Chicago, and lived in rooms back of the store; that prior to about May 1, 1915, defendant and her family lived in a cottage in the rear of the same lot, when they moved into another cottage across the street; that in the latter part of May, 1915, the relations between plaintiff and defendant became somewhat strained and that thereafter unpleasant incidents occurred; that the grocery store was sold about the middle of September, 1915 (after the commencement of the present action), but plaintiff and her husband continued to live together in the rooms back of the store

until the end of that month, when they moved to a flat a considerable distance away and there lived together for a short period of time, when plaintiff refused to live there longer and went to live with her mother. Plaintiff testified that after her said refusal and her going to live with her mother, plaintiff's husband went to live at defendant's home, and that plaintiff and her husband never thereafter lived together.

No useful purpose will be served in discussing the testimony bearing upon the several charges of slander contained in the first and second counts. Suffice it to say that we are of the opinion that the charges contained in the first count were not sufficiently proved as charged so as to warrant any recovery on that count. It is said in Ransom v. McCurley, 140 Ill. 626, 630; "It is well settled that to authorize a recovery in an action of slander, the words laid in the declaration, or enough of them to charge the particular offense alleged to have been imputed, must be proved substantially as charged. Evidence of the speaking of equivalent words, although having the same import and meaning, is not admissible, and words spoken interrogatively are not admissible to sustain an allegation of words spoken affirmatively." (See, also, Sanford v. Geddis, 15 Ill. 328; Wilborn v. Odell, 29 Ill. 456, 458.)

As to the second count it was stipulated on the trial that "the words testified by the witness," who was called to prove that defendant uttered and published the words as charged, "are the same words as set forth in the second count." But they are not actionable per se, and can only be rendered actionable by plaintiff averring and proving special damages resulting from their utterance and publication. (Strauss v. Meyer, 48 Ill. 385, 388.) Counsel for defendant makes the point that no special damages were proved. After a careful examination of the evidence bearing on this count we are of the opinion that the point is well taken. Counsel for

plaintiff here argues that as a result of the uttering and publication of said words plaintiff's husband avoided, neglected and deserted plaintiff. The evidence is clearly to the contrary. The incident occurred in June, 1915, and plaintiff and her husband thereafter lived together until about October 1, 1915, nearly a month after the present action was commenced, when plaintiff left her husband and went to live with her mother.

As to the third count, charging defendant with alienating the affections of plaintiff's husband, the gist of the charges are that on various occasions between June 1, 1915, and the commencement of the suit (September 4, 1915) defendant wrongfully enticed and persuaded said husband to neglect her, to fail to provide for her support, and finally to desert her without her consent. We do not think any of these charges are sufficiently proved by the evidence. As to the charge that defendant enticed the husband to desert plaintiff, it appears that the separation of plaintiff and her husband did not occur until about one month after the action was commenced, and it also appears that at that time plaintiff objected to the size of the flat they had moved into and left him and went to live with her mother.

Our conclusion is that the judgment of the Circuit Court must be reversed.

REVERSED WITH FINDINGS OF FACT.

BARNES and MORRILL, JJ., concur.

13 - 26768

FINDINGS OF FACT.

We find as ultimate facts in this case that the defendant did not speak and publish the words of and concerning plaintiff as charged in the first count of plaintiff's declaration; that plaintiff was not in anywise injured or damaged, or avoided, neglected or deserted by her husband, by reason of defendant speaking and publishing of and concerning plaintiff the words as charged in the second count of said declaration; and that defendant is not guilty of the charges, or any of them, relative to the alleged alienation of the affections of plaintiff's husband, as contained in the third count of said declaration.

212 - 26872

HUGH McLAUGHLIN, Appellee, vs. WOMEN'S CATHOLIC ORDER OF FORESTERS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a judgment for $1,000 entered against defendant by the Municipal Court of Chicago on January 22, 1921.

The action is upon a benefit certificate for $1,000, issued on May 28, 1903, in favor of plaintiff as beneficiary, by defendant, a fraternal insurance society, upon the life of Bridget McLaughlin, mother of plaintiff. She made written application for membership in the society on May 14, 1903, in which she stated over her signature "I was born in Ireland * * on the 16th day of August, 1864, and am between 39 and 40 years of age." She died on April 17, 1919, at Chicago, Illinois. There was a trial before a jury, resulting in the return of a general verdict finding the issues against defendant and assessing plaintiff's damages at $1,000, "with interest at 5 per cent per annum." The court submitted to the jury at the request of defendant two special interrogatories and they returned two special verdicts, as follows:

> "Interrogatory No. 1: Was Bridget McLaughlin over fifty years of age at the time it is claimed that she became a member of the defendant corporation? Answer: No.
>
> Interrogatory No. 2: On May 14, 1903, and thereafter ~~until and on May 28,~~ 1903, was Bridget McLaughlin over fifty years of age? Answer: No."

Defendant at the same time also requested the submission to the jury of the following other special interrogatories, which

request the court refused, viz:

> "Interrogatory No. 3: Was Bridget McLaughlin born more than one year before August 16th in the year 1864?
>
> Interrogatory No. 4: Did Bridget McLaughlin by herself or any other fail to pay benefit assessments to defendant or to any one for it for the month of February and thereafter in the year 1919?"

On the hearing of defendant's motion for a new trial plaintiff remitted the interest mentioned in the general verdict, and all claim for a judgment in excess of $1,000, and thereupon the court overruled defendant's said motion and also its motion in arrest of judgment and entered the judgment appealed from.

It is alleged in plaintiff's statement of claim that the certificate or policy of insurance issued to Bridget McLaughlin is in the possession of defendant and that it has repeatedly refused to deliver the certificate to him; that at the time of her death she was a member in good standing of defendant and its subordinate court, "Isabella Court No. 8;" that on or about December 1, 1918, during her lifetime, she went to the general offices of defendant, at Chicago, for the purpose of negotiating a loan from a third person upon said certificate, which certificate she then had in her possession and exhibited the same to Anna F. Phelan, an authorized agent and the High Secretary of defendant; that against her protest said Phelan took possession of the certificate, claiming the right so to do because of an alleged error or misrepresentation on her part as to her age at the time she became a member of defendant, and then and there notified her that defendant would not thereafter accept from her, or from anyone in her behalf, any further payments or assessments under said certificate; that ever since said occurrence she, or plaintiff or others in her behalf, has from time to time duly tendered, and offered to pay, to defendant the assessments levied against her under the terms of said certificate, but that defendant refused to accept the same; that after her death and within proper time plaintiff offered to make the proof of her death, and repeatedly demanded of

defendant the proper blanks required for that purpose, but that defendant refused to furnish said blanks or receive such proof of death, claiming that her insurance had lapsed; and that there is due to plaintiff, as the beneficiary named in the certificate, from defendant the sum of $1,000, together with lawful interest thereon from the time of the death of said Bridget McLaughlin on April 17, 1919.

In defendant's affidavit of merits, including an amendment thereto made at the time of the trial, it is alleged as one ground of defense that long before said certificate was issued to Bridget McLaughlin, the charter, constitution and laws of defendant provided, and still provide, that no person shall become a member of the defendant society who is over 50 years of age; that at the times of the signing of her application to become a member, her admission as a member and the issuance of said certificate, she was over 50 years of age; and that, therefore, plaintiff is not entitled to recover anything of this defendant, because the supposed contract of insurance is ultra vires and void. And, as another ground of defense, it is alleged that in her written application for membership, she wilfully, falsely and fraudulently stated that she was born on August 16, 1864, and was between 39 and 40 years of age; that in said application she warranted said statements to be true; that they were untrue, in that she was at the time of making said application more than forty years of age; and that they were wilfully and knowingly falsely made; and as a third ground of defense, it is alleged that said Bridget McLaughlin in her lifetime surrendered said certificate and ceased paying dues and assessments, and, in accordance with the by-laws of the society, became suspended and ceased to be a member of the society and was not in good standing therein at the time of her death, in that she paid no monthly dues and assessments for or during any part of the year 1919, prior to her death.

It thus appears that the pleadings presented three main issues of fact to be decided by the jury, viz: (1) Was the insured

over 50 years of age at the time she became a member of the defendant society, on May 28, 1903? (2) Did she in her application for membership on May 14, 1903, falsely state her age to be 40 years, or under, knowing said statement to be untrue? And (3) did she cease making payments of the dues and assessments for the months of the year 1919, prior to her death in April, 1919, or were those dues and assessments tendered to the society and refused by it?

As to the question of her age the evidence is conflicting. It will serve no useful purpose to set forth that evidence in detail. Suffice it to say that we think that the evidence is sufficient to warrant the jury in finding that at the date of her admission to the society she was not over 50 years of age and that at the time she signed her application she did not falsely or fraudulently state her age to be 40 years or under.

As to the payment of her monthly dues and assessments the evidence shows that about the end of the year 1918 the society attempted to cancel her certificate on the theory that she was over 50 years of age when she became a member, and thereafter refused to receive any further monthly payments, but the evidence sufficiently shows that sufficient tender of the monthly dues and assessments were made in her behalf prior to her death.

Complaint is made of the admission in evidence of a certain check and certain letters and of certain other rulings on evidence. We do not think that any error prejudicial to the defendant was committed in these particulars.

Complaint is also made of the refusal of the court to submit to the jury the special interrogatories Nos. 3 and 4 above mentioned. Counsel says that interrogatory No. 3 was submitted on the issue of a material misrepresentation in the application of the insured, as the difference of a year in the age makes a change in the amount of the monthly payments to be made. The question of a material

misrepresentation, wilfully and knowingly made, is not included in the interrogatory. As to interrogatory No. 4, the question submitted was immaterial because it is conceded that actual payment of the dues and assessments for the month of February, 1919, and thereafter until her death, was not made. The question was rather whether the dues and assessments for said month and thereafter had been tendered and refused. In our opinion no prejudicial error was committed by the court in refusing to submit said interrogatories.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

stewardship/tribes, notably not municipality-wide, is not included in the interpretation. In re Interpretation No. 1, the petition materials not sufficiently strong if it is remanded (b-1 voters were made at the time for investment for the Audit of Finance, 1990, and Investment until May 2010, was not made). The question was rather another. The same was overwhelmed for only month to after the from industry and tribes. It was obvious on preparation after was commented by the court in relation to notary and interpretation.

The judgment of the Territorial Court is affirmed.

AFFIRMED.

Bonner and Bivens, JJ., concur.

251 - 26912

PETER KLEIN, a minor, by Paul Klein, his father and next friend, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
vs.	
HARRIET B. HORLAND, Appellant.	

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Harriet B. Horland, defendant, from a judgment for $8,000, rendered against her after verdict by the Superior Court of Cook County in an action for damages for personal injuries received by plaintiff on November 15, 1915.

Plaintiff was nearly 15 years of age and was employed by the Brenham Printing Company, a tenant on the sixth floor of the building, owned by defendant, at No. 536 Federal street, Chicago. On this floor there was a passenger elevator in front and a freight elevator in the rear. Employees of the Printing Company were accustomed to use both elevators when taking bundles down, the choice between the two elevators being dependent upon the size of the bundles. If a pushcart was used the employees would go down in the freight elevator with the cart. On the day in question plaintiff started from the shop of the Printing Company on the sixth floor with a pushcart for the purpose of taking it down on the freight elevator and delivering certain bundles. He went to the elevator, rang the bell several times and then walked down to the fifth floor. In attempting to step in the elevator which was then at that floor the operator took hold of him, shoved and kicked him, and he went through a railing and fell from the fifth to the fourth floor and was injured.

Plaintiff's original declaration consisted of two counts. The first alleged in substance that the defendant by her agent and servant with force and arms assaulted plaintiff, struck and kicked him, and violently threw him from the fifth floor to the fourth floor of the building, whereby plaintiff was permanently injured, etc. The second count alleged that by force and arms defendant assaulted plaintiff and struck and kicked him, whereby, etc. Before trial plaintiff filed two additional counts, in the first of which it is alleged in substance that defendant was the owner of the building and operated an elevator for the carriage of freight and passengers between the floors of the building and employed a certain operator or conductor for the operation thereof, and especially for carrying the tenants and their employees; that plaintiff, a minor, was employed by one of defendant's tenants in the building and was rightfully entitled to ride and be safely carried on the elevator; that, as plaintiff was in the act of entering the elevator on the fifth floor of the building for the purpose of riding as a passenger on the elevator, defendant, by her agent and servant, to-wit, the operator or conductor in charge of the elevator, with force and arms assaulted plaintiff, violently struck and kicked him, and violently threw him from the fifth floor to the fourth floor of the building, whereby, etc. The second additional count was dismissed upon the trial. To all of the counts defendant filed pleas of the general issue, and to the additional counts a special plea denying the operation of the elevator and the employment of the operator.

Upon the trial defendant admitted the ownership of the building and elevator and withdrew her special plea, although denying that at the time the alleged assault was committed the elevator operator was acting within the scope of his employment. No evidence was introduced by defendant.

It appeared from the testimony of plaintiff's witness, Dr. Thornton, a physician who treated plaintiff about a dozen times following the occurrence, that plaintiff's injuries consisted of a cut about three inches long on the left side of his head above the ear, which required stitches, an injury to his nose, and bruises on his back and face. It further appeared from the testimony of other witnesses that from the time plaintiff first learned to talk and up to the time of the occurrence he had an impediment in his speech which caused him to stutter and stammer. Although the witnesses differed somewhat as to the extent of his stammering prior to the occurrence, there was testimony to the effect that after the occurrence his speech became and continued to be much less understandable. Plaintiff sought large damages on the theory that the less favorable condition of his speech, claimed to be permanent, was caused by the occurrence in question, and two physicians, Drs. Thornton and Murdock, were called as experts in support of this theory. The trial court, on its own motion, caused an examination of the plaintiff to be made by Dr. Edmund Jacobson, a physician selected by the court, and the latter testified as an expert in nervous disorders.

Counsel for defendant first contend that the court erred in refusing to direct a verdict for the defendant. The argument is that it was not shown by a preponderance of the evidence either that the assault was committed by a servant of the defendant or that in committing it he was acting within the scope of his employment. The effect of defendant's partial withdrawal of her special plea, and of her admissions on the trial, was that she was the owner of the building and elevator, and that the operator of the elevator was her servant. (Pennsylvania Co. v. Chapman, 220 Ill. 428.) Furthermore, plaintiff's evidence sufficiently shows that said operator

In another from the Supreme of Australia (1920), Dr. Cardozo, a dissenting one instead (Barwick) about a court. Among following the government, that plaintiff's injuries resulted of a not about bites lawyer Body on the left side of his head where the car, which requires citizens, an injury to his mere, was broken on his neck and face. It further appears from the testimony of other witnesses that from the time (Barwick) first turned to look and up to the time of the accident he had an implement in his hands which was a dangerous in little and thumb. Although the witnesses differed somewhat in the evidence in relation to the questions, there was evidence to the effect that after the accident the plaintiff became and continued to be much less industrious. Plaintiff might have sought on the theory that the injuries resulting of his injury, damage to the personal, and caused by the aforesaid in question, and the physicians, Drs. Jackson and Bryant, were called to testify as experts of this country. The trial court, on its own motion, sought to consider of the plaintiff to be made by Dr. Jackson testimony a physician attorney by the court, and the latter testified to the injury to means discovery.

Counsel for defendants first argued that the court erred in refusing to direct a verdict for the defendant. The argument is that it has not shown by a preponderance of the evidence that the wounds was received by a direct of the defendant or that in operating it he was acting within the scope of his employment. The effect of defendant's social activities of her special plan, not of her employment on the train, was that she was the owner of the building and the injuries, and that the employee of the defendant was not acting.

[Respondeat Ex] v. [illegible], 98 Ill. 602. [illegible], plaintiff's evidence sufficiently shows that the said employee

was defendant's servant, that defendant was operating the elevator by said servant, that plaintiff had a right to ride on the elevator as a passenger, and that he was a passenger, or about to become such, when the assault was committed. Under such circumstances we think that defendant was liable for the assault and that the court did not err in refusing to direct a verdict for defendant. (Hartford Deposit Co. v. Gollitt, 173 Ill. 222; Springer v. Ford, 189 Ill. 430; Feld v. Madison Building Co., 114 Ill. App. 29; Chicago & Western I. Co. v. Fleming, 101 Ill. 546, 550; McMahon v. Chicago City Ry. Co., 239 Ill. 334, 338.)

Counsel for defendant further contend that the court committed errors in the admission of certain testimony of the physicians who were called as experts, and that these errors brought about a verdict which is manifestly excessive. We have carefully examined the testimony of the three physicians and are of the opinion that in the examination of each certain testimony, prejudicial to the defendant, was erroneously admitted, and that on this account the judgment must be reversed and the cause remanded for a new trial. No useful purpose will be served in mentioning all of the testimony which we deem prejudicial. It is sufficient to say that in the long hypothetical questions severally asked of and answered by Drs. Thornton and Murdock, certain assumptions were contained therein for which there was no sufficient basis in the evidence, and which questions called for answers which were speculative. Dr. Murdock was also allowed to testify in detail as to an examination of plaintiff, made the evening before, and as to his observations concerning plaintiff's then condition. Some of his testimony was based upon subjective symptoms and should not have been admitted. (Greinke v. Chicago City Ry. Co., 234 Ill. 564, 571; Shaughnessy v. Holt, 236 Ill. 485, 488.)

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Morrill, J., concurs;
Barnes, J., took no part in the decision of the case.

12 - 26704

JOHN C. PATTERSON et al., Plaintiffs in Error,	ERROR TO
vs.	CIRCUIT COURT,
	COOK COUNTY.
SOLOMON A. SMITH et al., Defendants in Error.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ brings for review the action of the court below in sustaining the several demurrers filed to the amended declaration by which plaintiffs in error elected to stand.

The declaration is in trespass on the case alleging that defendants wrongfully, etc., conspired to, and in furtherance of the conspiracy, did make to the court in certain chancery proceedings certain false, fraudulent, etc., representations for the purpose of having the court wrongfully, improperly and illegally enter a decree therein, which decree, the declaration alleges, has not been set aside and is still in force and effect.

The last allegation dispenses with a fuller statement of the case, for while the decree remains in force, a proceeding in the nature of a collateral attack, like that set forth in the declaration, cannot be maintained. (Duffy v. Frankenberg et al., 144 Ill. 103; Gilmore v. Midwell, 191 Ill. App. 152; Lehaub v. O'Ferrall, 81 Atl. (Md.) 789; Young v. Leach, 50 N. Y. Supp. 670; Engstrom v. Sherburne, 137 Mass. 153; Lyford v. DeMeritt, 32 N. H. 234; Horner v. Robinsteck, 101 Pac. (Kan.) 996; Dunlap v. Glidden, 31 Me. 435.)

The declaration is predicated on fraud in obtaining the decree by false and fraudulent representations to the court, and not fraud that went to the jurisdiction of the court. In

such a case the decree can be attacked only in the original cause and cannot be impeached in a separate and independent proceeding. (Pratt v. Griffin, 223 Ill. 349, 350.)

While most of the parties defendant to the action were counsellors for parties in the chancery case in which the decree was entered, the action was none the less a collateral attack on said decree, for the gist of it is a claim of injury from an unjust or illegal decree resulting from the alleged conspiracy. But the decree is presumptively valid until set aside or impeached, and a party or privy cannot attack it in a collateral proceeding. We deem it unnecessary to analyze the authorities above cited sustaining this general broad rule. Even collusion between attorneys to the case furnishes no exception to it. (23 Cyc. 1099)

But it appears on the face of the declaration that the alleged misrepresentations were mainly - if not wholly so far as material or actionable - as to facts included within the findings of the decree, and therefore expressly adjudicated in that suit. Hence we cannot but look upon this proceeding as in effect a renewed attempt to relitigate and attack in another form the same decree unsuccessfully sought to be relitigated in Patterson v. Northern Trust Co., 267 Ill. App. 355, affirmed in 286 Ill. 564.

The decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

13 - 26705

225 I.A. 642

JOHN C. PATTERSON et al.,
Plaintiffs in Error,

vs.

SOLOMON A. SMITH et al.,
Defendants in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out December 13, 1920, to review a final judgment order entered December 7, 1918, and hence not having been sued out within two years from the date of said order, as required by section 117 of the Practice Act, as amended in 1919, (Chap. 110, Sec. 117, Cahill's Stats. 1922) it must be dismissed.

There being no saving clause in the amendatory act as to existing litigation plaintiffs in error were bound to comply with the changed procedure. (C. & A. I. R. R. Co. v. Guthrie, 192 Ill. 579.) Accordingly this court is without jurisdiction to hear the cause. (City of Chicago v. Industrial Commission, 292 Ill. 409.)

SUIT DISMISSED.

Gridley, P. J., and Morrill, J., concur.

21 - 26910

ADELINE S. MORSY,
Defendant in Error,

vs.

ALSENA S. CHAPELL,
Administratrix of the estate
of Sherman S. Chapell, deceased,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

225 I.A. 642

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ brings for review a judgment of $6,000 for personal injuries resulting from the collision of two automobiles. As grounds for reversal it is contended that the damages were excessive, and that plaintiff in error was prejudiced by argument to the jury and the absence of the judge from the court room when it was made.

As it is practically conceded that the verdict as to liability would not be disturbed on the ground that it was against the manifest weight of the evidence with respect thereto, we shall not review here the circumstances of the accident.

Most of the facts upon which the jury was called to estimate damages were uncontroverted. Practically the only controverted fact with respect to the character of the injuries was whether plaintiff received a skull fracture. The evidence thereon consisted mainly of medical opinion. While there was an X-ray of the skull introduced in evidence the only two physicians testifying as to what it indicated disagreed as to whether it showed a fracture. The diagnosis of plaintiff's two physicians who attended her shortly after the accident was that the attendant conditions or symptoms indicated skull fracture, but one of them admitted that the same symptoms might follow without skull fracture from a concussion of the brain, which it is not

questioned resulted from the accident. He also said that this might be a case of either concussion of the brain or a fracture. The diagnosis of the other physician was based upon the same or like symptoms. Plaintiff's own witnesses, however, were unwilling to say that her injuries resulting therefrom would be permanent. On the other hand, defendant's medical expert testified that in his opinion the symptoms referred to ensued from the concussion of the brain and did not indicate any local or absolute brain injury, and that the absence of such an indication was conclusive of only a temporary effect on the brain as a whole.

It does appear, however, that before the accident plaintiff was healthy and active, that she cared for her invalid father, 85 years of age, and performed her general household work and her duties as teacher of a primary school, in which she conducted exercises requiring some strenuous physical exertions, and that since the accident her ability in these respects has been much impaired. She was in the hospital for six weeks and did not resume her duties as a school teacher for several months, suffering in the meantime, and since to some extent, pains in and back of her ear - which bled at the time of the accident - and in her right leg and back.

Without going into further details we think the evidence is hardly sufficient to sustain a finding that there was a skull fracture, and that it is inferable from the testimony that a concussion of the brain with no apparent localized effect is not as serious in its consequences as a skull fracture. While there is no fixed standard for determining damages in such a case, they will not be permitted to exceed what is reasonable under all the circumstances. In this case we think it probable the jury included skull fracture as one of the elements of damage. The proof tending to establish its existence was too weak to

questioned immediately from the accident. He also said that this might be a case of either concussion of the brain or a fracture, the diagnosis of the other physician was based upon the case or like symptoms. Liability was alleged, however, with reasonable to say that her injuries resulting therefrom would be permanent. On the other hand, defendant's medical expert testified that in his opinion the symptoms referred to arose from the concussion of the brain and did not indicate any latent or absolute brain injury, and that the absence of such indications was conclusive of only a temporary effect on the brain as a whole.

In case report, however, that before the accident plaintiff was healthy and active, but was cared for by medical doctors, 20 years of age, and performed her personal household work and her duties as teacher of a primary school, in which she conducted exercises requiring some strenuous physical exertions, and that since the accident her ability to have exercise has been much impaired. She was in the hospital for six weeks and did not resume her duties in a school teacher for several months, suffering in the meantime, and since to some extent, pains in and back of her ear - which died in the time of the accident - and in her right leg and back.

Without going into further details to show the evidence is hardly sufficient to warrant a finding that there was a skull fracture, and that it is inferable from the testimony that a concussion of the brain with no serious lasting effect is not an uncommon in the consequence of a skull fracture. While there is no fixed standard for determining damages in such a case, they will not be permitted to exceed what is reasonable under all the circumstances. In this case we think it probable the jury included skull fracture as one of the elements of damage. The proof tending to establish the existence was too weak to

warrant such inclusion. We think damages should not be assessed above $5,000.

But it is argued that the jury were influenced in assessing damages by prejudicial argument and the absence of the judge from the court room when it was made. The remark of plaintiff's counsel, on which this claim is predicated, reads:

> "One word as to damages. Remember, gentlemen, that this is the only time that Mrs. Morey will ever have the opportunity to appear before a court and jury and ask that damages be assessed to her for the injuries she has sustained in this accident. If Mrs. Morey, inside of six months, by reason of some condition inside of her head, which is not now apparent, and if she would within six months become a total incapacitated paralytic she could never come into court and ask for damages."

Counsel for defendant objected to the remark and asked counsel arguing the case to "wait until his honor passes on it." Counsel improperly replied: "Well, your objection is not very important anyway." At this stage of the proceedings the trial judge returned to the court room from his chambers, where he had been when such remarks were made, and the statement was read to him and the objection thereto was over-ruled.

While we can not approve of the remarks, or the absence of the judge from the court room without suspending proceedings (Loftis v. Chi. Sys. Co., 293 Ill. 475) we can not think that either or both had any appreciable effect upon the verdict. The evidence upon the question of liability was not close, and, aside from the question of skull fracture, the controversy as to the matters upon which the jury were called to estimate damages were only as to the degree or extent of the injuries, as to which the testimony was specific. The jury were explicitly instructed that the damages were to be determined from the evidence under the instructions of the court which directed the jury's attention only to such damages as plaintiff had sustained, enumerating only as elements thereof her pain, loss of health and time, inability to work and physicians' bills. An

contact with Indonesia. The Dutch language is not yet in universal above (1,000).

Yet it is carried from the jungle even instruments in necessity answer by practical arguments and the discovery of the judge from the street room when it was made. The meaning of "physicality" remained, we claim that claim is withdrawal, speaks:

> "The head of is lawyer. Secondly, questions, that that be the only time that the. Only will over have the criminality in murder before a years and there and was that changes to continual is for for the activity the was required is their criminal. If are, years, inside of his working, to reason of when possibility inside of for case, this is not use government, and if she would claim she should lawyer a being interpretations analysis she should years when lady walk and ask the reason."

Counsel for defendant objected to the remark and Judge Bennett sustaining the case on "Will their this Power actions on life." Counsel inquiringly replied: "Sir, your objection is not very important matter." In this stage of the proceedings the trial judge returned to the court from his chambers, where he had been some much required new rule, and the industry and what is the and the objection therein was over-ruled.

Table we did not, approve of the reality, of the absence of the judge from the court room without adjourning proceedings (Miller v. Ind. Com., 78 Ill. 279) we can not hold this action as that not permissible effect upon the result. The evidence upon the question of sanity was not close, and, under that the question of sanity Treasure, the conviction of is the murder upon which the jury were asked to substitute changes very fully at in the trial as instant of the injuries, to be which the testimony was specific. The jury were explicitly instructed that the changes were to be considered. The evidence taken the functioning of the court XXX instructed the jury's attention only to such changes as tendency has mentioned, considering only a change thereof the plea, lack of mental and that, inability to sort the physical' XXX An

which on

instruction particularly warned the jury against being influenced by sympathy or any consideration other than the evidence and the law as given in the instructions, and against considering statements of counsel not proved by the evidence. There was nothing in any of the instructions or the evidence from which the jury could infer the right to recover for anything that might happen in the future, and we do not think the remark, which plaintiff in error criticizes from that point of view, and which defendant in error refers to as merely illustrating the limitation of her right to a single recovery, can reasonably be said to have misled the jury into considering as an element of damages a possible development in plaintiff's condition no where else referred to in the record and upon which there was no testimony. We think it would be a far fetched conclusion that the jury disregarded explicit instructions as to what they were to consider in assessing the damages and drew from this vague remark a conclusion at variance with the theory of the case as disclosed both by the evidence and the instructions.

We are aware that in the Loftis case, supra, it was said to be fatal error for the judge to absent himself from the court room during the argument to the jury, unless it appears that the complaining party was not prejudiced by what occurred in the court during his absence. No complaint is here made of any other error than the effect of counsel's remarks, which seemingly would be no different if the judge had been present. There was nothing in the incident to suggest an impropriety of procedure or conduct invited by the judge's absence. In this respect the facts are distinguishable from those commented upon in the Loftis case and others referred to. While neither counsel's remarks when critically analyzed, nor the judge's absence can be approved, we think it would be magnifying their significance out of all proportion to their probable influence upon the jury to treat them as reversible

error where the record shows unquestioned liability, and practically no controversy as to the material elements of damages or the facts, except as to whether there was a skull fracture.

We think, however, that a judgment for $5,000 is as much as should be allowed. If, therefore, plaintiff will within ten days herefrom remit from the judgment to that amount it will be affirmed, otherwise the case will be reversed and remanded.

Said remittitur, however, is allowed not upon the theory of curing error during argument, but merely because from the evidence the damages appear excessive.

AFFIRMED ON REMITTITUR TO $5,000.

Gridley, P. J., and Morrill, J., concur.

60 - 27008

JOHN DACEY,
Appellee,

vs.

BRIDGET DACEY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee sued his wife to recover on her personal note for $1500. Her defense was that the note was given under duress; that prior thereto plaintiff in consideration of her promise to marry him agreed to pay off a mortgage of $2205 on her home, and to that end paid towards it $1500, which is the $1500 purported to be represented by said note. She also pleaded she had a valid claim against him for board and lodging, and filed a set-off for the same, which included laundry work, nursing, care and attendance from January, 1916, about the time oftheir marriage, to December 14, 1920, when the suit was pending. In the statement of set-off she alleged the agreement was for $20 per week and she credited him with partial payments, leaving a balance exceeding the amount payable under the terms of the note.

A jury was called and the testimony of the respective parties heard. In the midst of the testimony of defendant with regard to her set-off the court, overlooking the effect of the statutes in removing restrictionsupon the powers of husband and wife to contract with each other, and enabling them to sue each other on such contracts, struck out all the testimony relating to said set-off, and the set-off itself. This was error. Issues were formed on the set-off, which, so far as it set up a claim for board and lodging, was enforcible if

there was an agreement therefor, which does not seem to be questioned, he claiming that he had paid board for all but two weeks.

There was some evidence also tending to show an ante-nuptial agreement, and that the $1500 was given in pursuance to such agreement. The weight of such testimony was not for the court but the jury, and under the circumstances it was error to give a directed verdict. Accordingly the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

79 - 27029

ELNA HANSEN,
Plaintiff in Error,

vs.

LESTER LARSEN,
Defendant in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a personal injury suit. Plaintiff in error was injured while riding in defendant in error's automobile, which he at the time was driving. Defendant's sister was also an occupant of the car and was riding in plaintiff in error's lap. It was a one-seated car and apparently afforded insufficient room for the three to sit upon one seat. The question for decision is whether the court erred in directing a verdict for defendant in error at the close of the evidence, which unquestionably presented a case for the jury as to defendant's negligence. It appeared therefrom that he had driven up behind a street car going in the same direction, which had stopped, or was just starting up, at a street intersection, and in turning to the left of the car to pass it, contrary to a city ordinance, thereby came into collision with another automobile whereby plaintiff was injured.

It is inferable from the arguments that the court directed a verdict either upon the theory that the proof did not show, as alleged in the declaration, that plaintiff was riding with defendant upon his invitation, or that she was not in the exercise of due care because she allowed his sister to sit in her lap. We think both of these questions should have been submitted to the jury. While it appears that

defendant, in compliance with a request or suggestion from his sister, drove his car and met the two ladies for the purpose of delivering Christmas gifts from a charitable association with which they were connected, yet we think the circumstances might indicate an implied invitation on his part for plaintiff to become his passenger, and that the question whether she exercised due care was purely a question of fact for the jury.

Accordingly we think the court erred in not submitting the case to the jury, and that therefore the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

92 - 27042

F. E. NELLIS & COMPANY, a corporation, Appellant, vs. ALEXANDER MARKETING COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for breach of contract to ship crated cabbage. The jury assessed damages at $1. Whatever the merits of plaintiff's case or the rule of damages, as there was no, or at least insufficient, proof of any damages sustained, the judgment entered on the verdict must be affirmed.

The order was for a car of crated cabbage f.o.b. San Benito, Texas. Defendant accepted a telegraphic order for the same to be shipped April 22, weather permitting. The evidence showed that the weather did not permit of shipment on account of rain which prevented growers from cutting and hauling the cabbage. The shipment not being made plaintiff telegraphed an inquiry April 24th. Defendant replied that it couldn't ship "crated" until the following week. On April 25th plaintiff wired to "express car" or it would buy in the open market. Defendant wired an offer to ship the same day but called for payment in advance of shipping because of plaintiff's change of order for expressing instead of freighting the goods. Defendant's order of the 25th was not accepted. Four days later defendant cancelled the offer for non-acceptance.

Plaintiff predicates its claim on the loss of an alleged difference between the purchase and market prices, but made no adequate proof of market prices on any particular date,

or that it went into the market and bought goods to replace those ordered, or that it had sold the goods contracted for, and had to replace them. The only evidence offered on the subject is that given by plaintiff's sales manager, which is altogether too indefinite and speculative to warrant finding anything more than nominal damages. He said he went into the market and "purchased other cabbage to fill orders," but when, or where, and what he paid, whether more or less than what he was to pay defendant, do not appear from the evidence. While he also testified that there was an advance in the price immediately after the sale it is not clear what date he had reference to, his testimony being that he was familiar with the market between April 19th when the order was first given, and April 25th, or that the price was higher when delivery was required, or that he had any definite or exact information as to the market price on any particular date or dates. His testimony was too general and indefinite upon which to predicate an assessment of damages, assuming that plaintiff was entitled thereto. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

124 - 27074

MERRILL C. MEIGS,
Appellee,

vs.

EMERY MOTOR LIVERY COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff was driving an automobile east on the south side of Oakwood boulevard, an east and west street, and defendant was driving one south on the west side of Ellis avenue, a north and south street, a residential district of Chicago, and the cars collided just south of the center of their intersection. Plaintiff sued for damages to his car and got judgment for $735.25.

Appellant complains that the verdict was against the weight of the evidence both on the question of the exercise of due care by plaintiff, and negligence by defendant. We have reviewed the evidence, which consists mainly of conflicting versions of the affair given by plaintiff and the driver of defendant's car. But we find no justification therein for disturbing the jury's verdict, nor necessity for a detailed recital thereof. It clearly preponderates to the effect that plaintiff was not driving at excessive speed, that his car had reached the intersection first, that, as was his duty, he looked first to his right for cars approaching from the south, and then to his left whence defendant's car was coming, and that defendant's driver, contrary to the rule to be observed in such a case, looked

first to his left and then to his right, too late at the speed at which he was driving to avoid a collision. The circumstances were such that plaintiff had under the statute the superior right of way over defendant's car coming from the north, as "all vehicles traveling upon public highways shall give the right of way to other vehicles approaching all intersecting highways from the right, and shall have the right of way over those approaching from the left: Provided," etc. (Sec. 33, Ch. 95a, Cahill's Stats. 1920.) The evidence indicates that the relative positions of the two cars were such just before the collision that it was the duty of defendant's car to yield the right of way to plaintiff's, and of the driver to approach the intersection with his car under sufficient control to comply with the law in this respect. It is apparent that he did not exercise such care. The night was dark and the pavement slippery with ice, and he approached the intersection with a degree of speed indicating disregard of both of these conditions and of the difficulty in stopping his car for one having the superior right of way.

Appellant complains of a modification of an instruction tendered by it from which the court eliminated an hypothesis of fact predicated upon plaintiff's driving at a greater rate of speed than 15 miles an hour, and which directed a verdict in case of the jury's so finding. The instruction as modified fully stated the law applicable to such a state of facts, and we do not think the elimination of a specific application of it constituted reversible error.

Complaint is also made of an instruction as to the duty of defendant's driver to give the right of way to all vehicles approaching the intersection from his right, which stated that the failure to give the right of way to plaintiff was negligence. While the instruction is defective, yet as

first to his left and then to his right, was less as the space at which he was starting to assist a cabinetman. The circumstances were such that plaintiff had lost the actual superior right of way over northbound car coming from the north, in this visible horizontal space within sufficient which left the right of way in which trivial, disregarding all intervening highways from the right, one could have the right of way over those approaching from the left: "Proceed," etc. Case, 53, ca. 5th, Cassidy v. Ross, 1908). The evidence indicates that the relative positions of the cars were such that before the collision this is not the duty of defendant's car to yield the right of way to plaintiff's, and if one driver is negligent the interference with his car under sufficient control to comply with the law in this respect. It is apparent that he did not exercise such care. The major car left and the prescribed clearance with law, and in approaching the intersection with a degree of speed (allegedly twenty of 25th of three modifiers) lack of the difficulty in stopping his car for the driver, the superior right of way.

Judicial consideration of a modification of an instruction tendered by it from which the court eliminated an hypothesis of fact predicated upon plaintiff's driving at a greater rate of speed than is alleg on fact, and which directed a verdict in case of the jury's on finding. The instruction as modified fully stated the law applicable to such a state of facts, and we do not think the elimination of a specific consideration of it constituted reversible error.

Complaint is also made of an instruction on the duty of defendant's driver to give the right of way to all vehicles approaching the intersection from his right, which stated that the failure to give the right of way to plaintiff was negligence. While the instruction is inaccurate, yet as

the evidence clearly indicates that both parties reached the intersection at approximately the same time, we think the jury probably regarded the instruction as applicable only to that state of circumstances. The instruction did not direct a verdict, and we do not think it calls for reversal.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

170 - 27125

RUDOLPH GEORG, Appellee,		APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.		
SAM LIEBERMAN, Appellant.		

225 I.A. 643

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this suit to recover $500 which he alleged he loaned to defendant. The latter claimed that such sum was given to him as security that plaintiff, a retail butcher, would not buy meat from any other party than defendant. Whatever arrangements they had were verbal and no other party was present when they were made.

It appears that one Kastren conducted a grocery store and leased out a portion of it for a butcher shop or meat store; that defendant ran the meat store for a while; that he was succeeded by another party who sold out his stock to plaintiff, and that the latter ran it thereafter. Defendant, however, continued paying rent to Kastren until some time after plaintiff took possession and the occupant reimbursed him therefor. Finally plaintiff paid the rent directly to Kastren. There was no lease for any specified time and Kastren was indifferent who occupied that portion of the store so long as he received the rent. There appears to have been no contract whereby plaintiff was obligated to pay rent to defendant or any consideration to support an agreement, if one existed, to buy meat of defendant only. Plaintiff denied that there was any such contract, and there was no evidence except defendant's that there was. The burden rested upon him to sustain his

defense that the $500 was put up as security for the enforcement of such an agreement. Even if there had been such an arrangement it does not follow that the $500 would be forfeited as liquidated damages, and there is no proof that he sustained any damages. We think the jury were justified in finding that the money was loaned to defendant.

AFFIRMED.

Gridley, P. J., and Merrill, J., concur.

7 - 26342

CLAIM OF CALVIN STEWART, executor of the last will and testament of MARGARETHA MOHRN, deceased, Plaintiff in Error,	)	ERROR TO
vs.	)	CIRCUIT COURT, COOK COUNTY.
ESTATE OF CHARLES B. MEHREN, deceased, Defendant in Error.	)	

225 I.A. 643

MR. JUSTICE MCBRILL DELIVERED THE OPINION OF THE COURT.

A claim was filed in the Probate Court of Cook County by Calvin Stewart, executor under the last will and testament of Margaretha Mohrn, deceased, against the estate of Charles B. Mehren, deceased, to recover $300 and interest thereon, alleged to have been loaned by said Margaretha Mohrn in her lifetime to Mehren, who was her brother-in-law. The claim was based upon a note alleged to have been executed and delivered by Mehren, which it is stated has been lost or mislaid, thereby preventing its production in court. An appeal was taken to the Circuit Court from the order of the Probate Court disallowing the claim. There was a jury trial in the Circuit Court resulting in a verdict and judgment against the claimant and in favor of the estate of Mehren. Appellant contends that the judgment is contrary to the law and the evidence.

Upon the trial of the case the claimant testified in his own behalf. His testimony as to conversations with Mehren was clearly inadmissible, but no complaint is made on that account. A memorandum kept by Margaretha Mohrn in her lifetime was received in evidence. This document contains words and figures evidently relating to sundry charges and receipts on account of interest. Its connection with the subject-matter of the case was not shown.

It does not on its face appear to be an account with Mehren. The court properly refused to allow certain other witnesses who were called to testify on behalf of complainant for the reason that they were interested parties and disqualified under the statute.

The claimant had the burden of proving the existence of the debt. He failed entirely in this respect. The record contains no evidence which would have justified the jury in finding the issues for the claimant. There is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

137 - 26795

GEORGE LUKIC,
Appellee,

vs.

THE METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

225 I.A. 644

MR. JUSTICE WORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for $492.33 upon a verdict for that amount in favor of appellee, who was plaintiff in the court below. The action is based upon a policy of insurance issued by defendant on the life of Kata Lukic, wife of the plaintiff, for $500, dated January 2, 1917, and payable to plaintiff as beneficiary. The declaration set forth the terms of the policy and alleged full compliance therewith on the part of the insured. A plea of the general issue and thirteen special pleas were filed by defendant. These special pleas alleged that certain statements in the application for insurance, which formed a part of the policy, were untrue, and particularly those relating to the prior illness of the insured and the character, symptons and treatment of the same and the present and past physical condition of the applicant, and that by reason thereof the plaintiff is precluded from recovering.

The application which formed a part of the policy contained signed declarations by the insured that the statements and answers to the questions of the defendant's medical examiner therein contained were true, and formed the basis of the contract of insurance and that all such statements were made as an inducement to the company to issue the policy. The statements which are alleged to be untrue were to the effect that the applicant

had never had consumption, disease of the lungs, habitual cough or spitting or raising blood; that she was in sound health and had no physical or mental infirmity of any kind; that she had not been under the care of any physician within two years; that she had never been under treatment in any dispensary, hospital or asylum or been an inmate of any alms house or other institution, and that she had never been seriously ill. The application was made November 19, 1916. The policy was issued January 2, 1917. The insured died of consumption June 3, 1917, at the Cook County Hospital.

The evidence sustains the contention of appellant, and it is practically undisputed, that many of the applicant's answers as to her present and past condition of health were untrue. These answers were material to the risk and constituted the basis of the contract of insurance. The policy was issued in reliance upon them. Their falsity would furnish ample ground for a reversal of the judgment herein were it not for the fact that the policy upon which the action is based contains the following provision:

> "This policy (and the application therefor) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue except for non-payment of premiums."

This feature of the policy is expressly recognized by the statutes of this state relating to the subject. (Kahill's Statutes, chap. 73, section 375, paragraph 3.) It is true, as suggested by appellant, that the case was not tried upon this theory and the incontestability of the policy was not considered upon the trial, but it has been repeatedly held that the beneficiary can avail himself of such a provision when the case is under consideration by a reviewing court.

In Zink v. Supreme Lodge of Knights of Pythias, 217 Ill. App. 54, the case was tried in the lower court upon the theory of suicide, but this court in its opinion gave effect to the incon-

had never had consumption, disease of the lungs, hospital cough or spitting or raising blood; that she was in sound health and had no physical or mental infirmity of any kind; that she had not been under the care of any physician within two years; that she had never been under treatment in any dispensary, hospital or asylum or been an inmate of any other house or other institution, and that she had never been insanely ill. The application was made November 19, 1921. The policy was issued January 9, 1921, the issue of that of consumption May 4, 1921, at the same company hospital.

The evidence sustains the contention of respondent, and it is practically undisputed. That each of the witnesses' memories as to her present and past condition of health were unclear. These answers were material in the risk and constituted the basis of the contract of insurance. The policy was issued in reliance upon them. Their falsity would provide ground for a rescission of the insurance herein even if it was the fact that the policy upon which the action is based contains the following provisions:

> "This policy (and the application thereof) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue except for non-payment of premiums."

This feature of the policy is effectually recognized by the statutes of this state relating to the subject. (Ballil's Statutes, sec. 77, Section 77. Subsection 3.). It is true, as suggested by appellant, that the case as was tried upon this theory and the inconsistability of the policy was not mentioned upon the trial, but it has been repeatedly held that the judgment can equal amount of such a provision when the case is under consideration by a criminal court.

In Ziak v. Grand Lodge of Knights of Pythias, 147 Ill. App. 56, the case was tried in the lower court upon the theory of suicide, but this court in the opinion gave effect to the insur-

testability provision in the policy. In Monahan v. Metropolitan Life Insurance Co., 283 Ill. 336, the defense was based upon the alleged breach of warranty contained in the application and not upon the ground that the policy had been procured by fraud, and the case was tried upon that theory, but the court held that the plaintiff was entitled to judgment for the reason that the policy contained a provision that it should be incontestable after two years except for fraud. In the case at bar the incontestability clause is absolute, except for non-payment of premiums, which is not relied upon as a defense. In the recent case of N. C. C. & St. L. Ry. Co. v. Chicago City Ryw. Co., 300 Ill. 168, it was held that this court is authorized to pass upon both the facts and the law, even though no propositions of law were held by the trial court.

The defendant was not relieved from the obligation of its contract to ascertain all the facts material to its liability and cancel or rescind the contract within the period of one year or be barred from thereafter contesting its liability under the policy. The right of the appellant to rescind the policy was neither enlarged nor abridged by the death of the insured. The provision that the policy shall be incontestable after one year from its date except for non-payment of premiums bars the company from contesting the policy on any ground except for non-payment of premiums if the insurer has had the full year in which to take action to void the policy. Ramsay v. Old Colony Life Ins. Co., 297 Ill. 592. After the lapse of the period of one year, even fraud is not available to void it. Flanagan v. Federal Life Ins. Co., 231 Ill. 399.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] provision in the policy. In Gordon v. [illegible] Life Insurance Co., 200 Ill. App. 2d. 1, the defendant [illegible] alleged breach of warranty contained in the application and [illegible] the issue that the policy had been cancelled by [illegible], and the case was tried upon that theory, but the court held that the plaintiff was entitled to judgment for the return of the policy premium on a provision that it should be incontestable after the policy expired except for fraud. In the case at bar the incontestability clause in question, which for consideration of premium, states in the policy upon which a defense is the issue was of [illegible] Life Ins. Co., v. Johnson Life Ins. Co., 200 Ill. App. 2d. 1, in the held that this court is endeavored to pass upon both the facts and the law, even though no consideration of law was had by the trial court.

The defendant was not entitled from the evidence of its contention all the facts material to the liability and sought to invoke the maximum utility the period of one year or be barred from thereafter interposing its liability under the policy. The right of the applicant to receive the policy was evidence sufficient to sustain the action of the trial court. The provision that the policy shall be incontestable after one year from its date issued for non-payment of premium bars the defendant from thereafter interposing the policy on any ground except for non-payment of premium if the insurer has had the full year in which to rule either on the policy. Dawson v. Old Union Life Ins. Co., 207 Ill. 474. After the lapse of the period of one year, even fraud is not available as a defense. Dawson v. Mutual Life Ins. Co., 207 Ill. 474.

The judgment of the municipal court is affirmed.

AFFIRMED.

Pakiz, P. J., and Lorenz, J., concur.

20 - 26836

SOLOMON JESMER,
Defendant in Error,

vs.

STATE COMMERCIAL AND SAVINGS BANK, a Corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

225 I.A. 644

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The writ of error herein seeks a reversal of a judgment of the Municipal court of Chicago for $523.56 against the plaintiff in error, who was defendant in the court below, and in favor of defendant in error, who was plaintiff below. Plaintiff's statement of claim shows that the action was brought to recover damages alleged to be due plaintiff on account of the alleged breach by defendant of a certain written agreement between the parties dated March 1, 1917, by the wrongful discharge of plaintiff from his employment by defendant on June 17, 1917. Defendant's affidavit of merits denied that plaintiff fulfilled the conditions of the agreement to be kept and performed by him, and that the discharge of plaintiff was wrongful. There was a jury trial resulting in a verdict and judgment for $523.56.

The contract between the parties provided that defendant employed Jesmer as manager of its foreign department relating to Russian and Polish trade for one year at $80 per month for the months of March, April and May, 1917, and $100 per month thereafter, and in addition should pay plaintiff a commission of 15 per cent of the net profits realized from the Russian and Polish trade. Plaintiff agreed to devote his entire time and efforts to the business and to use every effort to promote and successfully conduct the same. The other provisions of the agreement are not material to the consideration of the present

case. Plaintiff's salary was paid to June 17, 1917, which was the date of his discharge by defendant, and the judgment is for salary for the balance of the period between that date and March 1, 1918, less the amount earned elsewhere by plaintiff during that period.

The evidence shows that for the first few weeks after the employment commenced plaintiff was fairly attentive to his duties and constant in his attendance at his employer's place of business, although his efforts were unproductive of any of the results contemplated by the agreement. No profits were derived from the department under plaintiff's charge. Thereafter his conduct became unsatisfactory. It was the subject of repeated complaints from his employer, whose officers sought to obtain information from plaintiff as to how he was spending the large amount of time when he was not at his employer's office. He was frequently absent from defendant's place of business during business hours for large portions of the day. He claimed to be out of the office working up business for his employer, but refused to furnish the names of persons upon whom he had called or to give anything more than a very general account of his activities. He said that he was soliciting accounts for the bank, although he was not employed for that purpose. He refused to give the names of the persons solicited. The evidence further shows that during the period of his employment plaintiff was interested in newspaper work and devoted more or less time to it. Four witnesses testified to those facts. It is true that they are officers or employes of defendant, but they are not more interested in the result of the suit than plaintiff, who was practically the only witness on his side of the case.

The contract between the parties required plaintiff to devote his entire time and all his efforts to the service of

the defendant. The great weight of the evidence shows that plaintiff failed to fulfill this important condition of the agreement. For that reason defendant was justified in discharging plaintiff and there can be no recovery by him on account of his salary for the remainder of the period covered by the contract.

The judgment of the Municipal court was contrary to the manifest weight of the evidence and is therefore reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

20 - 26336

FINDING OF FACTS.

The court finds as ultimate facts in the case that plaintiff violated his contract with defendant and did not devote his entire time and all his efforts to the service of defendant.

30 - 26968

DUNMORE WORSTED CO., Inc.,
Appellee,

vs.

A. SITRON & CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 644

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim, filed June 28, 1920, alleged that on or about January 22, 1920, plaintiff contracted with defendant for the sale to the latter of 50 pieces of serge containing approximately 3500 yards at a price of $4.50 per yard, to be delivered during February and March, 1920; that on February 17, 1920, plaintiff delivered to defendant 11 pieces of said merchandise, containing approximately 850 yards of the value of $3439.60, which was paid by plaintiff in accordance with the contract; that during the months of February and March, 1920, plaintiff delivered the remaining 38 pieces, containing 2600 yards approximately, the value of which, at the agreed price, was $11,886.75, which became due and payable under the terms of the contract May 1, 1920, and that defendant failed and refused to pay any part of said sum. By its affidavit of merits defendant denied the existence of the contract mentioned and its liability to pay said sum. It admitted its refusal to pay, but alleged that there was nothing due under the contract. It further averred that under the contract made by defendant with an agent of plaintiff it was agreed that defendant could pay for the merchandise four months from delivery with a discount of 7%, or could pay in thirty days with a discount of 10% at defendant's option and that said four months had not elapsed at the time of bringing the suit. It further alleged that the goods delivered by plaintiff were not according to the sample but inferior thereto, and that upon the

receipt of said goods defendant notified plaintiff of such inferiority and cancelled its order for the balance of the goods. By an amendment to the affidavit of merits filed February 14, 1921, defendant denied that it ever entered into the contract specified in the statement of claim and alleged that said alleged contract is uncertain, indefinite and unenforcible, and that if there ever was such a contract it was duly cancelled by defendant before plaintiff acquired a right of action thereon. There was a trial before the court without a jury, resulting in a finding and judgment in favor of plaintiff for $11,886.75.

Appellant seeks a reversal upon the ground that the judgment is contrary to the law and the evidence, basing his contention upon the theory that there was no contract between the parties and that the alleged agreement upon which appellee relies was uncertain, indefinite and unenforcible; that it was void for lack of mutuality and that defendant had a right to cancel, and did cancel, the same February 17, 1920. These contentions were embodied in certain propositions of law and fact which defendant submitted and which the trial court refused to hold.

Substantially all of the evidence relating to the transaction is included in a stipulation between the parties, from which it appears that on January 22, 1920, defendant gave to one King, a salesman of plaintiff, an order for the 50 pieces of goods in question. King had no authority to accept or reject the order and was empowered only to receive the same and transmit it to his principal, which he did. This order provided for a discount of 10% if payment was made in thirty days and of 7% if payment was made in four months. The order was accepted by plaintiff without change, except as to the terms of payment. On January 31, 1920, plaintiff sent to defendant by mail a confirmation of the order,

which specified the 50 pieces of goods at the price mentioned in the statement of claim. It also stated the conditions of sale, which were, in substance, that the agreement was contingent upon strikes, accidents, delays of carriers or other delays beyond the control of the vendor; that all goods were sold f. o. b. mill and all deliveries consummated at the point of shipment; that the order was given and accepted upon the condition that the delivery of goods thereunder should be subject to a credit limit which might be fixed by the vendor at any time during the execution of said order; that no goods shall be returned or allowances made for any cause after thirty days from delivery or after goods are sponged or cut; that a discount of 10% is allowed if payment is made within thirty days; that the order is accepted subject only to the procuring of the necessary yarns by the vendor and might be reduced in quantity or cancelled entirely in accordance with the ability of the vendor to manufacture; that in dyeing the cloth the vendor will use the best materials obtainable but does not guarantee the results. The letter specified the only terms and conditions upon which the order was accepted by the vendor, and the vendee was instructed that if these terms and conditions were not in every way correct, the letter should be returned to the vendor immediately. Plaintiff was a manufacturer of cloth and defendant was a manufacturer of clothing.

The president of defendant company, who was the only witness upon the trial, stated that this letter was received by defendant but that he gave it no particular attention and did not notice the terms of payment specified. If the conditions of the proposed sale were unsatisfactory to defendant, it should have notified plaintiff promptly to that effect, as instructed in plaintiff's letter, in order that plaintiff might not be put to

the expense of manufacturing or shipping any part of the order. No such notice was given.

Prior to February 17, 1920, plaintiff shipped 11 pieces of the goods to defendant, which were accepted and paid for by defendant upon the terms mentioned in plaintiff's letter of confirmation. Thereafter a considerable correspondence ensued between the parties. Much of it relates to the claim of defendant that the goods did not conform to the sample submitted. As this defense was withdrawn upon the trial by stipulation, it is unnecessary to discuss those portions of the correspondence which relate thereto. The remainder of the correspondence indicates the dissatisfaction of defendant with the terms of payment specified in plaintiff's letter of January 31, 1920, and it is claimed that it was entitled to the alternative terms specified in the original order given to King of payment within four months with a 7% discount instead of payment in thirty days with 10% discount, as specified in plaintiff's letter of January 31, 1920. The testimony of the president of defendant company shows that there was a decline in the price of these goods in the summer of 1920. We regard a discussion of this correspondence as wholly immaterial, and therefore unnecessary, for the reason that defendant had ratified the terms of his purchase as stated in plaintiff's letter of January 31, 1920, by failing to reject them promptly upon receipt of that letter and by accepting and paying for a considerable portion of the merchandise covered by the order upon the terms therein specified. The record does not show that defendant ever repudiated the purchase. In its correspondence defendant claims that the goods were inferior to the sample, being "too light" (whether in color or weight is not stated) for its use, but on the trial abandoned this ground of defense. Defendant also found fault with the terms of payment, but it accepted

and paid for 11 pieces of the goods upon the terms specified by plaintiff. Plaintiff's letter of January 31, 1920, and the acceptance by defendant of the conditions therein stated, constituted the contract between the parties, which was certain and definite in its terms. After acceptance of plaintiff's terms of sale and a partial performance by plaintiff, defendant had no right to repudiate the contract and demand a cancellation of its order.

The contract was not void for lack of mutuality. Defendant's contentions in that respect are based upon the conditions specified in plaintiff's letter of confirmation to the effect that the agreement was contingent upon strikes or other delays beyond plaintiff's control and was subject to the ability of plaintiff to procure the necessary yarns. These conditions do not bring the contract within the class of cases cited by appellant holding contracts void for lack of mutuality where one party is bound and the other reserves the right to cancel or assumes no obligation whatever. Vogel v. Bekos, 157 Ill. 339; Olson v. Thiffen, 175 Ill. App. 182. Conditions of this character, excusing one of the parties from performance or from liability resulting from failure to perform in case of the occurrence of events beyond the control of such party, does not render the contract void for lack of mutuality. Ordinary business prudence requires that such reservations be made, unless the party intends to bind himself to performance at all hazards. Accordingly, it is customary to embody in contracts suitable provisions excusing performance and exempting a party from liability for non-performance in case performance is prevented by fire, flood, embargoes, strikes, lockouts, crop failures and other causes beyond the control of the party failing to perform. Such provisions do not render the contract void for lack of mutuality. 3 Williston on Contracts 1968; 13 C. J., p. 337, sec. 187, and cases cited. Plaintiff fully performed his obligations

under the contract between the parties and is entitled to recover for merchandise sold and delivered at the stipulated price.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

89 - 27039

B. M. SHARPE, receiver,
Appellant,

vs.

DAVID M. WOLFF,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 644

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The appellant in this case took judgment by confession against appellee in the Municipal Court of Chicago on August 23, 1920, for $80 and costs. The judgment was entered by virtue of the warrant of attorney contained in a certain lease from appellant to appellee. On September 1, 1920, on motion of appellee, leave was given to it to plead to the declaration, and it was ordered that the judgment previously rendered stand as security. The case was heard by the court without a jury. There was a finding and judgment against plaintiff, who has appealed.

The lease demised the premises known as flat No. 2 on the second floor of the building at 5209 Ingleside avenue, Chicago, for a period of one year from May 1, 1920, to April 30, 1921, at a rental of $90 per month, payable in advance. After the lease was executed the lessee, who is appellee here, paid $30 on account of the first month's rent. On May 1, 1920, he notified plaintiff that he would not take possession under the lease, stating as his reason for his refusal to do so that the premises were in an unsanitary condition. On that date plaintiff received by mail a check from defendant dated April 30, 1920, for $60, being the balance of rent due for the month of May, 1920. The check was deposited and was returned to plaintiff marked "payment stopped." Defendant failed to take possession of the premises pursuant to the lease and thereupon plaintiff re-rented the premises at $90

per month for the balance of the period to April 30, 1931, and took judgment against defendant as stated, the amount of the judgment consisting of the item of $60 for the balance of the May rental and $20 attorney's fees.

Defendant's affidavit of merits denied any indebtedness to plaintiff and alleged that he had paid to plaintiff the sum of $94, of which amount $30 was to apply upon the first month's rent and $64 was paid by defendant to apply upon the cost of cleaning and decorating the premises, the estimated expense of which was $124. The affidavit further alleged the unsanitary condition of the premises, which constituted his reason for failing to move into the premises. He claimed that the $64 paid by him for decorating expenses should be applied on the rental account, leaving plaintiff indebted to defendant in the sum of $4. The case was heard by the court without a jury, the trial resulting in a finding and judgment in favor of defendant.

The lease, among other things, provides, in substance, that the lessee has examined and knows the conditions of the premises and has received the same in good order and repair and that no representations as to the condition or repair thereof have been made by lessor prior to the execution of the lease that are not therein expressed. It has been held repeatedly that there is no implied contract on the part of a landlord that the demised premises are tenantable or that they will continue so during the term and that when a lessee enters into a lease covenanting that he has received the premises in good repair and agrees to keep the same in repair at his own expense, there is no implied covenant on the part of the lessor to keep the premises in a tenantable condition. The lessee takes the premises as he finds them and must hold them subject to whatever covenants his lease contains. Friedman v. Schwabacher, 64 Ill. App. 422; Watson v. Moulton, 100 Ill. App.

[illegible] for the balance of the period to June 30, 1972, and have judgment against defendant as claimed, the amount of the judgment constituting of one item or sum for the balance of the [illegible] yet unpaid.

Defendant's contention at motion hearing was jurisdiction be plaintiff and claims that he had paid to plaintiff the sum of [illegible], of which amount [illegible] was applied upon the first month's rent and [illegible] was paid by defendant in order that he may at [illegible] and terminate the tenancy. The evidence showed of record and [illegible] The affidavit further alleges the commencing residence of the defendant, which constituted his reason for failing to pay the rent. Mr. Jackson stated that the [illegible] paid by him for terminating apartment should be applied to the unpaid rent. Having jurisdiction lawfully to determine in the sum of $[illegible]. The case was tried by the court without a jury, the trial resulting in a finding and judgment in favor of defendant.

The issue, among other things, involves, in essence, that the lessee has complied with the terms of the contract of the apartment and his security the same in good order and repair and that he [illegible] in the condition or repair thereof. Same been made by lessor prior to the termination of the lease that was having expired. It has been held repeatedly that there is an implied contract on the part of a landlord that the premises are tenantable or that they will continue or become the same and that when a lessor enters into a lease representing that he has provided the premises in good repair and agrees to keep the same in repair at his own expense. There is an implied covenant on the part of the lessor to keep the premises in a tenantable condition. The lessee takes the premises, in the first place and must hold them subject to subsequent covenants his lessor assumes. Johnson v. Jamesmeier, 24 Ill. App. 1987. Fulton v. Dunlop, 201 Ill. 490.

560; Blake v. Hanous, 25 id. 486. The failure of the lessee to take possession of the premises is not a defense to an action for the rent. The demised term commenced May 1, 1920, and from that date the leasehold interest in the premises was vested in defendant for the term specified. His interest in the premises was definitely fixed and settled by the contract from the date of his delivery. If he elected not to take the premises or to abandon the same, he did so at his own risk. His liability does not depend upon possession. Landt v. McCullough, 121 Ill. App. 328; Mayer v. Lawrence, 58 id. 194; Babcock v. Scoville, 56 Ill. 461.

It is undisputed that the proposed lessee required the redecoration of the flat, the estimated cost of which was $124, and that the lessee agreed to pay $64 of that amount. Appellee requested that this work be done and agreed to pay a portion of the expense. He fulfilled this agreement and if he then decided to abandon the lease he cannot recover for the expense which he incurred upon his own request and for his benefit. The lessee violated the contract embodied in the lease and was therefore liable both for the rent and the additional expense incurred for decorating.

For the reasons indicated, the judgment of the Municipal Court is reversed and the case remanded with instructions to vacate the judgment of March 12, 1921, and to enter in its place and stead a judgment in the following form:

> "Therefore it is considered by the court that the judgment entered herein on August 23, 1930, in favor of plaintiff and against defendant for $80 and costs of suit stand in full force and effect as of the day of its rendition."

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

that Clark v. Lewis, 93 Ga. 516. The tendency of the courts is take cognizance of the contract in such a fashion as to enforce the rule. The decision from Georgia only is, 1874, and from that time the "liberal" doctrine is the prevailing rule which is followed for the term specified. The interest in the previous was definitely fixed and written by the contract from the date of the delivery. If he elected not to take the property or to abandon the sale, he did so at his own risk. The liability does not depend upon negligence. Lewis v. Tompkins, 116 Ill. 487, 490. Kelly v. Lawrence, 72 Ga. 1941 Thomas v. Lewis, 94 Ill. 121, 123.

It is established that the personal injury remedies the representations of the fact, the existence that of which was false, and that the injury sustained is any loss of that nature. Opinion expressed that this must be done and answer to the a profits or the express. To fulfill this agreement and if he then decided to abandon the issue he cannot recover for the expense which he incurred since his act fraud and the benefit. The issues related the material material in the issue and not the interpretation which the over and the multiplied common interest for damages.

For the reasons indicated, the judgment of the trial court is reversed and the case remanded with instructions to enter the judgment of April 15, 1921, and to enter in lieu of the judgment a judgment in the following form:

"Therefore, it is considered by the court that the plaintiff recover damages on account of, 1920, in favor of plaintiff and against defendants for the sum equal to the difference between the price paid for the property and the value of the property at the time of the delivery.

Reversed and remanded with instructions.

Bellingy, J. L., and Bussey, J., concur.

99 - 27049

MIDLAND OPERATING COMPANY, a Corporation, for use of MIDLAND INVESTMENT COMPANY, a Corporation, Plaintiff in Error, vs. MIDLAND CASUALTY COMPANY, a Corporation, Defendant in Error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

225 I.A. 644

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error seeks the reversal of a judgment against it in an action of assumpsit which it brought in the Superior court of Cook County July 21, 1919. Plaintiff is an Arizona corporation and defendant a Wisconsin corporation.

Plaintiff's claim is based upon the alleged liability of defendant under a certain contract between them dated August 31, 1915. On that date defendant was known as the Badger Casualty Company, but thereafter changed its name to that of Midland Casualty Company. On the date of the contract there was in existence an Illinois corporation known as the Midland Casualty Company, between which and the plaintiff there had been prior business relations. The contract of August 31, 1915, recited the execution of a certain other contract dated September 23, 1913, between the Midland Casualty Company, an Illinois corporation, and the plaintiff, whereby that company agreed to pay plaintiff a certain fixed percentage upon the gross premiums collected by the Casualty Company from the sale of personal accident and health policies issued and to be issued by the Casualty Company between the years 1914 and 1935. It also recited that the Badger Casualty Company (which is now known as the Midland Casualty Company, a Wisconsin corporation) had consummated an agreement with the Midland Casualty Company of Illinois to reinsure all

of certain lines of policies previously issued by the Illinois company as of June 30, 1915, and that it was the desire of all three of the companies mentioned to cancel said contract of September 23, 1913, and enter into a new agreement in lieu of all prior agreements between the Midland Casualty Company of Illinois and plaintiff. Under this agreement the Badger Casualty Company agreed to pay plaintiff commissions at fixed rates on the various lines of business acquired under its contract with the Midland Casualty Company of Illinois, and that the payments should be made semi-annually on the 15th days of January and July of each year, accompanied by a written statement showing the collections during the period for which payment was being made. Under this contract plaintiff covenanted to cooperate in every way reasonably within its power to facilitate the transfer of the insurance business of the Midland Casualty Company (meaning the Illinois company) to defendant. There were attached to this contract as Exhibit "A." a copy of the agreement between the Midland Casualty Company of Illinois and the plaintiff, dated September 23, 1913, which provided for the payment by the Casualty Company to the Operating Company of certain fixed percentages on premiums collected by the Casualty Company, and as Exhibit "B." the agreement between the Badger Casualty Company and the Midland Casualty Company of Illinois providing for the assignment by the Illinois company to the Wisconsin company of all of its right, title and interest in policies issued by it prior to and in existence on June 30, 1915, and for the assumption by the Wisconsin company of the risks under said policies.

It is undisputed that plaintiff fulfilled its obligations under the contract of August 31, 1913; that the Midland Casualty Company of Illinois transferred its business to the Badger Casualty Company in accordance with its agreement; that the Badger Casualty Company subsequently changed its name to that of the Midland Casualty Company; and that several payments were made by defendant to plaintiff under the

agreement of August 31, 1915, but that no payments were made for the first half of the year 1917 and for the subsequent semi-annual periods.

Several pleas were filed by defendant, but it is necessary to consider only one of them, as no evidence was introduced by defendant in support of the remaining pleas. By its third plea defendant alleged that plaintiff is an Arizona corporation organized on or about December 22, 1908; that the purposes for which it was incorporated were to act as insurance agent, financial agent, broker or fiscal agent for other corporations; to own, handle and control letters patent and inventions and shares of its own capital stock and that of other corporations and to vote any shares of stock of other corporations owned by it; to borrow money and to issue bonds, notes and other evidence of indebtedness and secure the payment of the same by mortgage, deed of trust or otherwise; to do a general manufacturing and mercantile business and in general to do and perform such actions and transact such business in connection with the foregoing objects not inconsistent with law in any part of the world as its board of directors might deem advantageous, and that plaintiff's articles of incorporation provided, among other things, that plaintiff's principal place of business outside of the territory of Arizona should be at Chicago, Illinois. The plea further avers that beginning with December, 1910, plaintiff commenced the transaction of the business at Chicago for which it was incorporated and that thereafter and ever since plaintiff maintained an office in Chicago for the transaction of said business and held all of its corporate meetings within the State of Illinois. The plea further averred that plaintiff was never at any time licensed or authorized to transact business in the State of Illinois and had never complied with the provisions of the Illinois law regulating the admission of foreign corporations for pecuniary

agreement of August 15, 1921, but this no longer was also the first half of the year 1921 was the very uncertainty about-
tomorrow period.

Lateral phase were filled by difficulties, but it is necessary to consider only one of them, as an criterion was interpreted by Czechoslovakia in support of the revisionist plans. By its stand that International alleged that liability is a reference-
provision supposed on or about December 6, 1920; then the proposed
for which it was interpreted was to act as insurance court.
Financial agent, member of Tribal Court for other correspondence;
to see, Bucsi and Ungarian Report and Irrigation and Issue
of its own original check the fact of other correspondence and to vote
any choice of right of other International agreed by it; to Barcos
away and to Lower Danube, Marco and other evidence of independence
and assure the opinion of the case by morrigone, need of Tamar to
Commerce; to be a general account-keeping and commercial business
and to provide to be not problem year without but Czechoslovakia such
Tribunal in connection with the Hungarian minister for International
with law in any part of the world as the issue of Hungarian might
them disappearance, and that liability minister of International
property, among other things, this liability's principal place of
business subject of the territory of Hungarian should be at Budapest,
Illinois. The plan further there then corresponding with Hungary, the
plaintiff mentioned the jurisdiction of the National to claim the
which it not incorporated the that Czechoslovakia and open Hungarian-
ility contribution an office in Chicago for the transaction of all
business and hold all of the corporate activity within the state of
Illinois. The plan further received that plaintiff was never at any
time licensed or authorized to transact business in the state of
Illinois and had never complied with the provisions of the Illinois
law regulating the admission of foreign corporations for business

profit to do business in the State of Illinois, but that on the contrary, had transacted its ordinary business in that state in violation of the laws of Illinois. The plea further avers that the contract of August 31, 1915, was made in the State of Illinois and was to be performed therein and that at the time of the execution thereof plaintiff was transacting its ordinary business in the State of Illinois in violation of the laws of that state, by reason whereof the said contract of August 31, 1915, is null and void and the plaintiff prohibited from maintaining any action thereon in the courts of the State of Illinois.

The execution of the contracts mentioned is not denied and there was evidence tending to sustain plaintiff's claim. At the close of plaintiff's case a motion was made by defendant for an instructed verdict in its favor, which was denied by the court. Thereupon a large amount of evidence was introduced tending to show the nature of the business which had been conducted by plaintiff in the State of Illinois commencing in the year 1908, and for several years subsequent thereto, from which it appeared that plaintiff had maintained an office in Chicago and a clerical force for the transaction of its business and had entered into contractual relations with the Midland Casualty Company of Illinois for the sale of stock and policies issued by the latter, and that it had at all times during said period, and afterwards, maintained a bank account in different banks in the City of Chicago. It appears, however, from the evidence that plaintiff had transacted no business in Illinois subsequent to September, 1913. The secretary and treasurer of the plaintiff corporation testified that plaintiff had not sold any of the stock of the Midland Casualty Company after September 3, 1913, and that it had never sold any insurance or insurance contracts or established any insurance agencies or an office force or employes in the City

of Chicago or elsewhere after that date; that its books were kept in Chicago after September, 1913, and that the only business done after that date was the collection of the commissions due to it under its contract with the Midland Casualty Company of Illinois of September 23, 1913, and its subsequent contract of August 31, 1915, with defendant. It kept a bank account in Chicago during 1914 and subsequent years, but the transactions in 1914, 1915 and 1916 were few in number. During the year 1917 there was one credit and no debit transactions, and since that time there has been a balance of $8.99 in the account. The balances during the entire period since 1914 were small and generally less than $100 at any time. At the close of defendant's testimony the motion for an instructed verdict in favor of defendant was renewed and was allowed by the court and judgment was entered accordingly.

The statute of the State of Illinois provides that no foreign corporation doing business in this state without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort. Cahill's Statutes, chap. 32, sec. 94. It is admitted by plaintiff that it has no license to transact business in the State of Illinois, but plaintiff insists that since September, 1913, the only business transacted by it in this state was the single transaction with the Midland Casualty Company of Illinois embodied in the contract with that company of September 23, 1913, and the agreement substituted therefor with defendant dated August 31, 1915. Defendant's motion for an instructed verdict seems to have been allowed upon the theory that defendant had established an affirmative defense, which was not contradicted or explained by any rebuttal testimony on the part of plaintiff and that defendant's testimony fully established the facts necessary to support such defense, thereby rendering it proper to direct a verdict for defendant. Gallner v. C. T. Co.,

245 Ill. 148.

As we view the case, the validity of the defense that plaintiff is precluded from recovery upon the ground that it was unlawfully doing business without a license in the State of Illinois must be determined by the facts and circumstances shown regarding the business conducted by plaintiff on August 31, 1915, and subsequent thereto. Much evidence was introduced upon which defendant's argument is based to the effect that for several years prior to September, 1913, plaintiff was transacting some of its corporate business within the State of Illinois without a license, but such argument is predicated upon inference rather than upon specific proof. There is no evidence showing that plaintiff, immediately prior to and on and subsequent to August 31, 1915, was transacting any business in the state other than the receipt of the commissions accruing to it under the contract with defendant. The business which a foreign corporation is prohibited from transacting in the State of Illinois without a license is that which is done in accordance with the charter powers of the corporation which were conferred upon it by the state where it was incorporated, and not such acts as are essential to the proper management of its internal affairs. Alpena Co. v. Jenkins, 244 Ill. 354; Wendel v. Swan Land Co., 154 id. 177; Bradbury v. Waukegan Co., 113 Ill. App. 600. Accordingly, it has been held that maintaining an office for the convenience of agents and employes and for the administration of the internal affairs of a corporation does not constitute a violation of the statute. Isolated business transactions, giving notes or obligations for indebtedness, purchasing supplies and making collections, have been held to be acts which a foreign corporation can perform in this state without the necessity of securing a license to transact business. Bees v. T. & P. Ry. Co., 250 Ill. 376; Flew v. Beard, 274 id. 232;

Bradbury v. Waukegan Co., 113 Ill. App. 600.

We are of the opinion that the trial court was not justified in directing the jury to find the issues for defendant, and that the case should have been submitted to the jury. The evidence of an affirmative defense was not sufficient to warrant the court in failing to observe the rule that if there is any evidence in the record, which, standing alone, tends to prove the material allegations of the declaration, the motion for an instructed verdict should be denied, even though the court is of the opinion that a verdict for plaintiff if given must be set aside as against the preponderance of the evidence. Libby, McNeil & Libby v. Cook, 222 Ill. 506.

The judgment of the Superior Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

121 - 27071

KATHERINE TOMASIEWICZ,
Administratrix of the
estate of Frank Tomasiewicz,
deceased,
Appellant,

vs.

JOHN BARTON PAYNE, Director
General of Railroads, Agent
of the United States,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The declaration alleged that on April 29, 1919, defendant was operating the railroad of the Chicago, Milwaukee & St. Paul Railway Company as a common carrier engaged in interstate commerce, using certain railroad yards belonging to that company in Chicago; that the decedent, Frank Tomasiewicz, a car sealer working in said yards, was killed as the result of an accident caused by defendant's negligence in suddenly moving certain cars without giving any warning to the decedent. There was a verdict and judgment in favor of defendant. A reversal is sought on account of alleged errors of the trial court in giving and refusing to give certain instructions. No other errors are mentioned as grounds for reversal.

It is undisputed that the accident occurred on the date alleged, resulting in the death of Tomasiewicz; that the decedent was an employe of defendant engaged in interstate commerce; and that the proceedings in the case are governed by the Federal Employer's Liability Act of April 22, 1908. Under the provisions of this act (sec. 3) the fact that the employe may have been guilty of contributory negligence does not bar a recovery, but the damages are subject to diminution in proportion to the negligence attributed to the employe. The effect of decedent's contributory negligence, if any, on

provided in the act, was stated correctly in one of the instructions given, (I. C. R. R. Co. v. Skaggs, 240 U. S. 66) but was erroneously presented in the following instruction given at defendant's request.

> "The court instructs the jury that Frank Tomasiewicz was bound by law to use his senses to ascertain the ordinary dangers incident to the work in which he was engaged, and that this duty was upon him not only at the immediate time of the accident in question, but also for such time prior thereto, as he may have had occasion for exercising such precaution, if any, and if you believe from the evidence that Tomasiewicz neglected to use his senses with ordinary care and prudence for his own safety and was injured in consequence of such neglect, he is not entitled to recover a verdict against the defendant."

This was a peremptory instruction and was not cured by another instruction correctly stating the law upon the subject. It is impossible to say that the jury did not follow the erroneous instruction. Fardridge v. Cutler, 168 Ill. 504.

Under the Federal Employer's Liability Act, contributory negligence of the employe may constitute a defense if proved to be the sole cause of the accident, (Great Northern Ry. Co. v. Miles, 240 U. S. 444) but it does not appear from the pleadings or proofs that the question of contributory negligence of the employe was an issue in the case at bar. Under the rule announced in Central Vermont Ry. Co. v. White, 238 U. S. 507, the burden of proving contributory negligence rested upon the defendant. Therefore we think that the jury may have been misled by the eleventh instruction, by which they were directed to find the defendant not guilty in case they believed from a preponderance of the evidence that the fatal injury was caused solely by the employe's negligence.

These erroneous instructions require a reversal of the judgment, and we shall therefore refrain from any expression of our views as to the scope or weight of the evidence, except in so far as it relates to an assumption of risk by the employe which was pleaded by defendant. We think that there was evidence tending

provided in the suit, was stated correctly in one of the instructions given (1) (2) (3) (4) or (5). The (1) (2) (3) was not necessarily prejudicial to the Plaintiff (initiating party) in minimum amount.

> "The court instructs the jury that through inadvertence and haste or lack of care in the drafting of a contract the ultimate purpose intended by the parties may not be expressed, and that this may be so even when the mistake is the mutual fault of the parties. In such cases, but only in such cases, it is competent for equity to reform the contract so as to express the intention of the parties, and if you believe from the evidence that inadvertence or mistake in the drafting of the contract made it necessary for the parties to use the words contained in the contract in order to express the intention of the parties, and that the words used in the contract do not express the intention of the parties, you will find for the defendant."

This was a perfectly instruction and was not moved by another instruction correctly stating the law upon the subject. It is impossible to see that the jury did not follow the correct instruction. Kansas v. Dalton, 248 Ill. 504.

Under the Federal Employer's Liability Act, contributory negligence of the employee may constitute a defense if proved to be the sole cause of the injuries. Illinois Central Ry. Co. v. Adams, 180 U.S. 28; that it does not operate from the beginning as proof that the position of contributory negligence of the employee was as large in the view of law. Under the rule announced in Illinois Central Ry. Co. v. Hall, 148 U.S. 367, the duties of master and employee negligence could never be determined. There is ground that the jury may have been misled by the eleventh instruction, by which they were directed to find the defendant not guilty in case they believed from a preponderance of the evidence that the Total injury was wholly caused by the employee's negligence.

These arguments introduced relative to verdicts of the jury, and we shall consider further the propriety of our views in the only order or weight of the evidence, except in order to be in violation of rules by the majority view was placed by instructions. We hold that there was reversible error.

to sustain this defense and that therefore there was no reversible error in giving instructions which presented that theory. It was a question for the jury. Philadelphia & R. Ry. Co. v. Marland, 239 Fed. 1. We do not find that the phraseology employed in these instructions confused the question of assumed risk with that of contributory negligence, as contended by appellant. Except as above noted, we find no reversible error in the giving or refusing of instructions.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

130 - 27081

GUMBINSKY BROS. COMPANY,
a corporation,
Appellant,

vs.

MULLEN BROS. PAPER COMPANY,
a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago entered June 30, 1921, vacating a judgment for $9,665.46 entered April 4, 1921, in favor of plaintiff. The judgment was by default on account of defendant's failure to file an affidavit of defense within the time limited by the court.

Plaintiff, who is appellant here, contends that the petition to vacate the judgment and the affidavit in support thereof did not show a meritorious defense and did not set forth facts and circumstances sufficient to justify the court in vacating the judgment and that section 21 of Municipal Court Act authorizes the court to set aside a judgment more than thirty days after its entry only upon such a showing as would sustain a bill in equity for that purpose. It is urged by appellee, who was defendant in the Municipal Court, that the order vacating the judgment was interlocutory only, and for that reason the appeal should be dismissed, as section 91 of the Practice Act permits appeals only from final judgments, orders and decrees.

It has been held repeatedly that the proceeding to vacate a judgment under section 89 of the Practice Act is a new suit and that the order of the trial court therein is final and appealable. Cramer v. Traveling Men's Association, 260 Ill. 516, citing Mitchell v. King, 187 id. 542; Domitski v. American

Linseed Co., 221 id. 161. The proceeding under section 21 of the Municipal Court Act, which is of the same character, was discussed in Doyle v. Fallows, 207 Ill. App. 5, and was declared to be a new suit, thereby making applicable the rule established with reference to proceedings under section 89 of the Practice Act. This rule was recognized in Gulley v. Mathis, 195 Ill. App. 170. Under these authorities the order vacating the judgment in the case at bar must be held to be appealable.

The order in question was entered without notice to appellee, whose appearance was on file at the time. The allegations of the petition to vacate are not denied. The affidavit of defense and a claim of set-off were prepared and executed by defendant in apt time to permit their filing on April 2, 1921, as required by the prior order of the court. The failure to file them was due to a mistake which must be regarded as excusable under the existing circumstances. It was not due to any direct negligence on the part of appellee or his attorneys. These facts did not appear upon the face of the record, and if they had been brought to the attention of the court at the time the judgment by default was entered, unquestionably the court would have allowed the affidavit of defense and the claim of set-off to be filed. The failure to file them being due to mistake and these documents showing on the face a good and meritorious defense to the action, we are of the opinion that there should be a trial on the merits and that the discretion of the court in vacating the judgment was properly exercised.

The order of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

Linseed Co., 173 Ill. 512. The proceeding under section 21 of the Municipal Court Act, which is of the same character, was discussed in Doyle v. Billings, 263 Ill. App. 4, and was declared to be a new suit, thereby making applicable the rule [illegible] in proceedings under section 89 of the Practice Act. This rule was announced in [illegible] v. [illegible], 177 Ill. [illegible]. Under these authorities the order vacating the judgment in the case at bar must be held to be appealable.

The court in entering the order [illegible] without notice to appellee, whose appearance was on file at the time. The allegations of the petition as to events are not denied. The affidavit of defense and a claim of set-off were prepared and [illegible] by defendant in [illegible] time as to permit their filing on April 8, 1931, as required by the rule order of the court. The failure to file them was due to a mistake which will be regarded as excusable under the existing circumstances. It was not due to any lack of diligence on the part of appellee or his attorneys. These facts did not appear upon the face of the record, and if they had been brought to the attention of the court at the time the judgment by default was entered, undoubtedly the court would have allowed the affidavit of defense and the claim of set-off to be filed. The failure to file them being due to mistake and there presently showing on the face a good and meritorious defense to the action, we are of the opinion that there should be a trial on the merits and that the discretion of the court in vacating the judgment was properly exercised.

The order of the Municipal Court is affirmed.

McSurely, P. J., and Hatchett, J., concur.

23729

130 - 27081

CUMMINSKY BROS. COMPANY, a corporation, Appellant, vs. MULLEN BROS. PAPER COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 645

MR. JUSTICE NORMILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, entered June 30, 1931, vacating a judgment for $9,665.46, entered by said court April 4, 1931, in favor of plaintiff. The judgment was by default on account of defendant's failure to file an affidavit of defense within the time limited by the court.

Appellant contends that the petition to vacate the judgment and the affidavit in support thereof did not show a meritorious defense and did not set forth facts and circumstances sufficient to justify the court in vacating the judgment, and that section 81 of the Municipal Court Act authorizes the court to set aside a judgment more than thirty days after its entry only upon such a showing as would sustain a bill in equity for that purpose.

Section 91 of the Practice Act permits appeals only from final judgments, orders and decrees. The courts of this state have held uniformly that this statutory provision permits an appeal in these cases only where the judgment, decree or order from which the appeal is taken terminates the litigation between the parties upon the merits of the case. Rosenthal v. Board of Education, 239 Ill. 29; C. & N. W. Ry. Co. v. City, 148 id. 153; Lewis v. New Music Hall Co., 100 Ill. App. 415. Applying this rule to the case at bar, it follows that the

order vacating the judgment from which this appeal is prosecuted is not final and appealable. The judgment was set aside merely for the purpose of allowing the moving party to interpose a defense. The order vacating the judgment was interlocutory only. City of Park Ridge v. Murphy, 278 Ill. 365; Cramer v. Illinois Commercial Men's Assn., 260 id. 516; Bailey v. Conrad, 271 id. 294.

The order in question was not a proper subject of appeal, and therefore the appeal must be dismissed.

APPEAL DISMISSED.

Gridley, P. J., and Barnes, J., concur.

375 - 27333

IN RE ESTATE OF CRADTUS A. BARNES,
Deceased,

ON APPEAL OF HENRY W. MAGNE,

Appellant,

vs.

MARIA F. BARNES et al.,

Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

225 I.A. 645

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County affirming an order of the Probate Court of Cook County granting leave to the administratrix of said estate to make a settlement with Maria F. Barnes of all matters in litigation between them. It has been consolidated for hearing with case general number 27332, in which an opinion has been this day filed. The latter case was an appeal from a decree of the Circuit Court disposing of an intervening petition filed by the appellant herein in case number 295367 in said Circuit Court. The present appeal involves precisely the same questions as those which have been considered in our opinion in case number 27332. We therefore deem it unnecessary to give any further expression of our views upon the matters involved in this appeal, which are identical with those presented in case number 27332.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

6974

2374a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6974 No.

Lester Fay, by his next friend, etc., appellee, vs. Rockford City Traction Company, appellant.	Appeal from Winnebago.

DIBELL, P. J.

On July 26, 1918, Lester Fay, then three years, seven months and twenty days old, was knocked down and run over by a street car operated by the Rockford City Traction Company, and was very seriously injured. He brought this suit against the traction company to recover damages for said injuries, and filed a declaration. The first count charged that defendant negligently ran said car along the street where the accident happened at a high and excessive speed and ran it against plaintiff, by means of which he was injured. The second count charged that defendant, by its servants, negligently failed to keep the proper lookout, as a result of which plaintiff was thrown down and under the car and injured. The third count charged defendant with a negligent operation of said car on said street, as the result of which plaintiff was struck with great force and thrown down and hurt. Defendant filed the general issue. There was a jury trial. Plaintiff had a verdict for $5,500. A motion by defendant for a new trial was denied. Plaintiff had judgment. Defendant appeals.

The main injuries were as follows. Both feet were crushed, and the right foot so seriously that it was amputated and afterwards a second amputation became necessary. The front and back of his body were very badly bruised, as were his face and his scalp. Much surgical care of the scalp and of the left foot was required. It is not claimed the damages are excessive. Because of his extreme youth he could not be guilty of contributory negligence. His mother was a widow, doing domestic work for a family a few doors

away from the place of the injury, and there was some evidence on the question whether she was negligent in permitting the child to get upon the street; but because the suit is brought by him, her negligence would not be a defense, and also, there was no proof which would charge her with negligence. The sole contention of defendant on this appeal is that the court at the close of plaintiff's evidence and again at the close of all the evidence, should have instructed the jury to find the defendant not guilty, whereas the court refused to give such instructions. The sole question therefore is whether the jury were warranted in finding defendant guilty.

Fourteenth Avenue in the city of Rockford extends east and west. Seventh Street extends north and south and crosses Fourteenth Avenue. Appellant operates a single track street car line on 7th Street. At the crossing of said two streets there is at the south east corner a shoe store, at the south west corner a candy store, and at the northwest corner a grocery. Mrs. Fay lived with and did domestic work for a family named Church in a flat a short distance east of the shoe store. Back of the shoe store and the candy store was an alley. The street car in question was approaching Fourteenth Avenue, coming from the south. By the rules governing its motorman he was required to make a safety stop at Fourteenth Avenue, which meant that he should either stop his car entirely at the south line of Fourteenth Avenue or that he should have his speed so reduced and his car so under control that he could stop at the south line of Fourteenth Avenue if the safety of others required it. As this car came over the alley and towards Fourteenth Avenue the little boy started from the sidewalk some where north of the alley back of the shoe store and ran diagonally in a north west direction. Apparently he was going to the candy store where he seems to have been once before that morning. He went under the car and there received those injuries. Appellant contends that the boy was not in front of the car but went under

[illegible] the question whether the was negligent in permitting the child to get upon the street; but because the mere is enough to show, her negligence would not be a defense, the case, there was a court which would charge her with negligence. The sole contention of defendant on this appeal is that the court at the close of plaintiff's evidence and again at the close of all the evidence, should have instructed the jury to find the defendant not guilty, because the court refused to give such instructions. The sole question therefore is whether the jury was warranted in finding defendant guilty.

Fourteenth avenue is the site of [illegible] and west. Seventh street extends north and south and crosses Fourteenth avenue. [illegible] line on 7th street. At the crossing of said two streets there is [illegible] south east corner a [illegible] store, on the south west corner a [illegible] store, and at the northwest corner a grocery. Mr. [illegible] lived with and did domestic work for a family named Cannon in a flat a short distance east of the above stores. Each of the above stores and the candy store was in [illegible]. The street was in question and approaching Fourteenth avenue, coming from the south. By the [illegible] preventing its motorman he was required to make a [illegible] across Fourteenth avenue, which meant that he should either stop his car entirely at the south side of Fourteenth avenue or slow up so that he could stop at the north side of Fourteenth avenue in the safety of others requires it. He did not do one of the [illegible] Fourteenth avenue the little boy, coming from the sidewalk area where north of the alley west of the above stores and ran diagonally in a north west direction. [illegible] was going to the candy store where he seems to have been some [illegible] that morning. He went under the car and there received [illegible]. Testimony [illegible] that the boy was not in front of the car but went under

the side of the car, and therefore the motorman was not in duty bound to see and protect him. This is largely based on the evidence of Mrs. Ellen Swanson, a witness for appellee. Mrs. Swanson could not speak English, did not know the points of the compass, could not measure distances in feet but only in metres, the meaning of which was not explained to the jury by any witness. Her evidence was vague and indefinite. Appellant claims that she was the only eye witness, and that the meaning of her testimony is that the boy went under the side of the car back of the front truck. The jury were warranted in finding that she was not the only eye witness. Harold Lundeen, a witness for plaintiff, was at the grocery and saw the boy in front of the street car just crossing the track about 30 feet south of the south line of Fourteenth Avenue, and saw the street car hit the boy and knock him down and that he went under the front trucks. C. E. Church, a member of the family where Mrs. Fay worked, a locomotive engineer by occupation, reached the scene of the accident a few minutes after it occured. He was a witness for appellee in chief and in rebuttal. He found blood stains about 35 feet south of Fourteenth Avenue and still further south a disturbance of the surface in the center of the track, as if something had been dragged in the center of the track, and this disturbance began about six feet south of the blood stains. When the car was stopped all agree that the boy's head was on the west rail just in front of the rear trucks. The jury were warranted in finding that this disturbance of the ground was caused by the body of the boy and that the blood stains also came from him. There is no evidence that any part of the rear wheels had passed over the boy, and there is nothing to show how his foot could have been crushed and the blood stains produced if he went under the car at the side and back of the head truck. The motorman testified that he did not see the boy at all till after he had stopped the car because of so eams by some one, probably Mrs. Swanson. He was a witness for appellant,

and the questions put to him in chief assumed that he was standing as he was approaching Fourteenth Avenue. The car had a vestibule in front which was wooden part of the way up from the floor and closed glass above that. On cross examination it developed that he was not standing, but sitting on a stool. The glass began about two or two and a half feet from the floor. He testified that the boy would have had to be eight feet or more away from the front of the car before he would have seen him. There was another motorman on the rear of the car. His attention was attracted to an automobile backing out of the alley. Nobody testified whether this was on the east or west side of the street, but apparently it was on the west side, and he remembered that the head motorman sounded a gong at that alley because of that automobile backing out. The head motorman testified that the backing of the automobile helped him to remember that he sounded the gong on that account. The jury may have concluded from the testimony of these two witnesses that in fact the head motorman was looking in the direction of the automobile to the west instead of looking straight ahead as he claimed. There was much dispute as to the speed of the street car at the time it struck the boy. Several witnesses for plaintiff put it at 20 miles per hour, while several servants of defendant testified that if it had been going at that speed when the boy was struck it could not have been stopped by the time it reached Fourteenth Street, and the two motormen on the car out the speed very low. Probably the speed was between these two estimates. There is probably no rule of law that fixes with precision the distance from the track over the street which such a motorman should have under observation. Whether the car was going rapidly or slowly it would seem that this motorman might justly be held bound to see this child after it left the sidewalk and before it reached this street car track, and if the motorman was driving as slowly as he claims, he could have stopped almost instantly if the

safety of the child demanded it.

It seems to us that this case is in principle very like Ferryman v. Chicago City Ry. Co., 242 Ill. 269. There a boy, slightly older than appellee, was on a street car track in the city of Chicago and was struck by the street car and injured much as appellee was. The gripman was looking at some men engaged in an altercation on the side of the street and did not see the plaintiff till he was near the approaching car and when it was too late to stop. The judgment for the plaintiff in that case was sustained, which could not have been done if the evidence did not justify a verdict for the plaintiff. For the reasons stated in that case we are of the opinion that the jury in this case were warranted by the evidence in finding defendant negligent and that that negligence caused these injuries.

The judgment is therefore affirmed.

Jonas, J. dissents.

In my judgment the evidence shows that the motorman was not negligent as charged.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of June in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6984
~~6864~~

No. 14.

William B. Elliott, Coroner, etc., for the Use of L. M. Hines, et. all appellee, vs. Anna Smith, et al. appellants.	Appeal from Peoria.

DIBELL, P. J.

This is an appeal from a judgment of the circuit court of Peoria County, in favor of appellee and against appellants in an action of debt on a replevin bond given by the appellant, Anna Smith, as principal and by the other appellants as sureties.

The appellant, Anna Smith, at the time of the transactions in question was a widow of the age of seventy-five years. For a considerable length of time she had transacted little or no business. According to her own testimony, all of her business was transacted by her daughter, May, hereinafter mentioned. All of her banking business was done by her said daughter under a power of attorney which was despoited with the Bank. She was the owner of certain farm property. She also owned a home in Peoria. At the rear of the premises on which this home was situated there was located a large garage, With Anna Smith there lived her two children, GeorgeJ. and May M. Smith. For a time the children conducted a public garage in the said building in the rear of the premises owned by their mother. They were agents and distributors for the Westcott Motor Car Company of Springfield, Ohio, and as such bought and sold Westcott cars. The business of the garage and agency was carried on under the name of "Westcott Garage."

The business of the firm was not successful. On

December 30, 1919, Patrick J. Fitzpatrick recovered a judgme. against the co-partners in the sum of $2,500.00 on which judgment, an execution was thereafter issued and levied by Lewis M. Hines, as Sheriff, on a seven passenger Westcott touring car as the property of the said George J. Smith and May M. Smith. This levy was made on May 20, 1920. On the next day, Anna Smith instituted proceedings in replevin for the recovery of said car and the above mentioned replevin bond was therein executed. The property was replevined and delivered to her. The sheriff filed appropriate pleas in the action of replevin. The suit was not prosecuted but was dismissed on motion of the defendant and a writ of returno habendo was issued. The writ was duly served on appellant who refused to deliver the car in question and hence this suit upon the bond.

To the declaration in debt herein the defendants filed a plea of the general issue and also two special pleas wherein they admitted the suing out of the writ of replevin, the execution of the replevin bond, the dismissal of the replevin suit, the judgment for the return of the property and that the same was not returned. The special pleas aver that the merits of the case were not determined in said replevin suit and in consequence thereof, no greater damages can be recovered than one cent, because the automobile in question was at the time of the levy under the execution and at all times thereafter the property of Anna Smith and not the property of the said George J. Smith and May M. Smith. Replications were filed thereto.

The controlling question of fact is whether or not the automobile was the property of Anna Smith. According to the testimony of George J. Smith and May M. Smith, the business and property of the Westcott Garage were transferred to their mother, Anna Smith, between the 17th and 19th of December, 1919,

December 30, 1922, Patrick J. Rice writing concerned a judgment in the co-defendant's favor on the 18th day of June, 1922, on the joint and, the execution was returned and levied by Frank M. Hilton, as Sheriff, on a seven passenger touring car as the property of the said George T. Smith and Ray E. Rice. This levy was made on May 24, 1922. The plaintiff instituted proceedings in replevin for the recovery of said car and the above mentioned judgment was entered thereon. The property was replevied and is in issue in the. The property was appropriated by the action of replevin. The evidence presented was conflicted on behalf of the defendant and a jury of twelve returned verdict in favor. The evidence was given on appeal, the judgment to reverse the case for the error in admitting this evidence upon the trial.

In the accompanying in said bonds the defendant filed a plea of the general issue and also the accepted along regards they, entitled the money and a. the and of the claim. The execution of the replevin bond, the statement of the replevin suit, the judgment for the return of the property and that the case was not terminated. The bonds plead were the receipts of the car were not authorized in said or have said and in consequence thereof, no property thereby was recovered but our car. Issues the evidence in question was of the line of the levy under the execution and of the after lien. for the property of the. Still and not the property of the said George T. Smith and Ray E. Rice. The defendant was filed verdict.

The contending questions of law I. The car was the automobile was the property of Ann Smith. According to the testimony of George T. Smith and Ray E. Rice, the property and property of the Wabash Garage, the defendant in the action, Ann Smith, filed the 27th day of December, 1922,

only a day or so prior to the date of the judgment against the in favor of Fitzpatrick. No bill of sale was executed and the record discloses no apparent change in ownership. The son, George, continued to run the business. The testimony of May M. Smith and also of R. J. Belsley and John Denzler, cashier and assistant cashier respectively of the Home Savings and State Bank of Peoria, in which the banking business of both Anna Smith and May Smith was done, does not disclose that any deposits were made to the credit of Anna Smith because of the garage business nor that any sums were drawn against the account of Anna Smith because of such business, unless it be the sum of $3,400.00 which was used for the purchase of the car in question and also another car at the same time.

It is fairly inferable from the evidence that at the time of the purchase of the said two cars neither of the partners had the money with which to buy them. George admitted that he was "broke." There were at least two certificates of deposit issued by the above mentioned bank in the name of May M. Smith but she testified that these certificates were the property of her mother and represented funds belonging to her mother.

On April 14, 1920, George J. Smith was in Springfield, Ohio, in person and purchased from the Westcott Motor Car Company the above mentioned cars. The one over which the controversy arises in this case, was specially equipped with wire wheels and cost at the factory $2,381.14. An order was given for the car on the usual form of the Motor Company, disclosing that the sale was made to the Westcott Garage. It was signed by the Said George J. Smith. In payment of these two cars George J. Smith gave to the Westcott Motor Car Company, a cashier's check payable to its order for $3,400.00, two

other checks for $1,137 and $44 respectively, and also fifteen cents in money, making a total of $4,581.15. We are unable to tell from an examination of the abstract or from the record itself who was the drawer of the two smaller checks, which checks do not appear to have been offered in evidence. However, both George J. Smith and May Smith testified that all of the money paid for the cars was the money of Anna Smith. The seven passenger car was driven from the factory to Peoria and placed in the Westcott Garage by George J. Smith. It was used very little thereafter up to the time it was levied on under the execution. One witness testified the car had been shown to him by George J. Smith who offered to sell it. This Smith denied. The license for the car was obtained under the name of the Westcott Garage. After the automobile was replevined, Anna Smith obtained insurance on the car in her name and a short time thereafter she shipped it to California where she also went. The car was there used by her and a California license in her name was procured by her. She has since returned to Peoria and continued to claim and exercise acts of ownership over the car.

The jury under proper instructions of the court found a verdict in favor of the plaintiff in the sum of $2,887.10 which was within the limit of the proof of damages on account of the failure of the appellant to return the car, attorneys fees incurred in the replevin suit and costs.

We have little doubt that the money used for the payment of the car in question was obtained from the appellant, Anna Smith, but the fact that the money was hers is not decisive of the issues in this case. Under the issues as they were joined, the burden was upon her to establish her claim of ownership of the car. She was a witness in the case and at no time during her examination did she made any claim of ownership.

She was not asked by counsel any question concerning matters which would really shed any light upon this subject. She volunteered the testimony that she furnished the money and could do it again. The evidence does not show that she ever exercised any act of ownership over the car until after it had been replevined by her. Whether or not the car was in fact the property of Anna Smith was a question of fact for the jury. Under all the circumstances we can not see that the jury's determination of such fact was against the manifest weight of the evidence and we, therefore, ought not to disturb the verdict. We have examined all of the instructions complained of by appellants and conclude that none of them is subject to the objections urged. Each of them stated the law correctly as it should be applied to the facts in this case. The judgment of the circuit court is, therefore, affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of May in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

6981

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

225 I.A. 644

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

23754

6987 No.49.

John T. Gardner, appellee, vs. James C. Davis, Director General, and Agent of the United States, appellant.	)	Appeal from Winnebago.

DIBELL, P. J.

About 9.15 P. M. of August 25, 1918, John T. Gardner, on alighting from a passenger train to close a switch, fell into a deep hole beside the switch and was injured. He brought suit against Walker D. Hines, Director General of Railroads, and the Chicago, Milwaukee & St. Paul Railroad Company, to recover damages for said injuries and filed an appropriate declaration. Both defendants filed the general issue and the railroad company also filed a special plea that it was not operating the railroad at the time of the injury. There was a jury trial and a verdict for plaintiff for $2,000. A motion for a new trial by the defendants was denied and plaintiff had judgment against both defendants. Afterwards by stipulation said judgment was so amended that it was only against James C. Davis, Director General and Agent of the United States, and that the railroad company had a judgment in its favor. The Director General and Agent appeals.

It is argued by appellant that at the time of the injury appellee was not acting as an employee but as a mere volunteer, and apparently also that while he was acting as a volunteer he was not in interstate commerce, and therefore this suit, which is under the Federal Employer's Liability Act, cannot be maintained. Appellee was baggage master, express agent and mail agent on a local train, which seems to have started in Wisconsin each morning, been in Rockford, Illinois, in the middle of the forenoon and again in the middle of the afternoon, and in Wisconsin again at night. The train stayed

[illegible]

John T. Gardner, appellee,

vs.

Thomas G. Davis, Director General, and Agent of the United States,

appellant.

Appeal from Dunlap.

Affirmed, etc.

About 9.15 p. m. of August 22, 1920, John T. Gardner, on alighting from a passenger train to cross a railroad, fell into a deep hole beside the walks and was injured. He brought suit against Walker D. Hines, Director General of Railroads, and the Chicago, Milwaukee & St. Paul Railroad Company, to recover damages for said injuries, and filed an appropriate declaration. Both defendants filed the general issue and the railroad company also filed a special plea that it was not operating the railroad at the time of the injury. There was a jury trial and a verdict for plaintiff for $2,000. A motion for a new trial by the defendants was denied and judgment for judgment against both defendants. Thereupon by stipulation said judgment was so amended that it was only against Thomas G. Davis, Director General and Agent of the United States, and that the railroad company had a judgment in its favor. The Director General and Agent appeals.

It is argued by appellant that at the time of the injury appellee was not acting as an employee but as a mere volunteer, and apparently also that while he was acting as a volunteer he was not in interstate commerce, and therefore the suit, which is under the Federal Employer's Liability Act, cannot be maintained. Appellee was a baggage master, ticket agent and mail agent on a local train, which came to Hero started in Wisconsin each morning, been in Jackson, Illinois, in the middle of the forenoon and again in the middle of the afternoon, and in Wisconsin at night. The train stopped

one night in Beloit, Wisconsin, and the next night in Janesville, Wisconsin. Appellee had been at work on the railroad in the capacity mentioned for six or eight months. When they reached Beloit every other evening the train was headed north, and was put away on a sidetrack some distance south, and it became necessary to pass through at least two switches to reach the point where the train was left. The conductor left the train at the depot, and the rest of the train men put the train away. The brakeman rode on the advancing end as the train backed up, and got off at the first switch and opened it and walked to the second switch and opened it. The baggage master got off at the first switch and closed it after the train had passed by, and then went to the second switch and closed it in like manner. No officer of the road ordered appellee to do this work. No printed rule required that duty of him. He testified that when he first took that position the brakeman told him that he must close the switches after the train as it was put away. It is contended that the brakeman had no authority to give him that order. Appellee also proved by a witness who had been a conductor on that train for several years and who had known of that practice for ten or twelve years, that ever since he had known of the train stopping at Beloit every other night, the baggage master had gone with the train to its resting place at night and had closed the switches. From that long continued practice we think the fair presumption is that this was a duty which rested upon the baggage master, notwithstanding no express printed or written order could be found for it. We therefore hold that the jury was warranted in finding that he was engaged in the performance of his regular duties in closing those switches, and therefore that he was engaged in inter state commerce while putting away the train.

Section 4 of the Federal Employer's Liability Act

one night in Beloit, Wisconsin, and the next night in Janesville, Wisconsin. Supplies had been at work on the railroad in the capacity mentioned for six or eight months. When they reached Beloit every other evening the train was loaded with, and was put away on a siding some distance south, and it became necessary to pass through at least two switches to reach the point where the train was left. The conductor left the train at the depot, and the rest of the trainmen put the train away. The brakemen rode on the caboose and as the train backed up, and got off at the first switch and coupled it and walked to the second switch and open d it. The baggage master got off at the first switch and closed it after the train had passed by, and then went to the second switch and closed it in like manner. No officer of the road ordered Supplies to do this work. No printed rule requires that duty of him. He testified that when he first took that position the brakeman told him that he must close the switches after the train is put away. It is contended that the brakeman had no authority to give him that order. Supplies also proved by a witness who had been a conductor on that train for several years and who had known of that practice for ten or twelve years, that over that road he had knowledge of the train coupling at Beloit every other night, the baggage master had gone ahead of the train to the switches, closed at night and had closed the switches. From that long continued practice we think the only inference is that there was a duty which rested upon the baggage master, notwithstanding no express command or written order could be found for it. We therefore hold that the jury was warranted in finding that he was engaged in the performance of his regular duties in closing the switches, and therefore that he was engaged in interstate commerce while making some the work.

Section 4 of the Federal Employers

of 1908 provides: "such employee shall not be held to have assumed the risks of his employment in any case where the vi lation by such common carrier of any statute enacted for the safety of employees contributed to the death or injury of such employee." This injury did not arise in that way, and therefor the assumption of risk by the employee is as it would have been without that statute. Appellee assumed the risk if he knew of the defect and appreciated the danger and continued in the employment without objection. The railroad company had a "Safety First" card, blanks of which were kept in convenient places, and employes who discovered anything dangerous were required to fill in one of these cards and describe the place of danger and send it to the superintendent. About ten or fifteen days before this accident appellee, when closing this switch in the night time, discovered a hole and filled out a "safety first" card, on which he said: "There is a hole at the switch by the bridge at the round house in South Beloit, where we put our train up." He signed it: "Baggageman 301," 301 being appellee's train number. He put this in an envelope and sent it to Beloit, Wisconsin, addressed to the superintendent. The superintendent never communicated with appellee about this, and he did not repair the defect. Appellee only saw this hole at 9.15 P.M., by the light of his lantern. The jury was warranted in finding from the evidence that he did not know the depth of the hole. He had a right to expect that the defect would be promptly repaired. As he made complaint in the manner provided by the railroad company, we are of the opinion that the jury was warranted in finding that he did not assume the risk under the circumstances in proof, ten or fifteen days after his complaint, and after a reasonable time in which to repair.

The second instruction given for appellee left it to the jury to determine whether plaintiff assumed the risk, but did not define assumption of risk. That was properly a matter

of 1908 provides: "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the death or injury of such employee." This injury did not arise in that way, and therefore the assumption of risk by the employee in a case would have been without that statute. Counsel assumed the risk of the defect and appreciated the hazard and encountered it in the employment without objection. The railroad company had a "Safety First" card, blanks of which were kept in convenient places, and employees who discovered anything dangerous were required to fill in one of these cards and describe the place of danger and send it to the superintendent. Since the plaintiff's claim arose this accident occurred, when closing this action in the night time, discovered a hole [illegible] on which he said: "There is a hole in the switch [illegible] at the [illegible] He signed it: "Tagesgesman 401," 401 being Coppellen's train number. He put this in an envelope and sent it to Beloit, Wisconsin, addressed to the superintendent. The superintendent never communicated with Coppellen about this, and he did not repair the defect. Coppellen only saw this hole at 3.15 A.M., by the light of his lantern. The jury was warranted in finding from the evidence that he did not know the depth of the hole. It was a right to expect that the [illegible] properly repaired. It is [illegible] railroad company, we are of the opinion that the jury was warranted in finding that he did not assume the risk under the circumstances in evidence, [illegible] and after a reasonable time in which to repair.

The second instruction given for plaintiff tells it to the jury to determine whether [illegible] the road, and did not define transportation of risk. That was properly a matter

of defense to have been defined by instructions requested by defendant. (Moore v. Wabash R. R. Co., 299, Ill. 596, on p. 605.) Appellant showed that it appreciated this by its third and fourth refused instructions, but each of these instructions was defective. The third left it to the jury to say whether appellee "reasonably should have known of the possible hazard," and the fourth left it to the jury to say whether appellee "should have known of the possible hazard." It did not tell the jury under what conditions appellee should have known of the possible hazard, in order to defeat his recovery. Perhaps the jury would have understood it to mean "by the exercise of reasonable care," or they might have understood that the jury were at liberty to determine, for any reason which they chose, that appellee should have known of the hazard. These instructions were properly refused. We are of the opinion that the fifth instruction, given for appellee, was not erroneous. It was based on the Federal Act.

It is contended that the damages are excessive. It is true that a physician who attended appellee in behalf of the express company, for which appellee also worked, gave evidence tending to minimize the injury, but when we consider the testimony of appellee and of two other physicians and the testimony concerning X-ray pictures and what they demonstrated as to his physical condition, we conclude the damages cannot be demonstrated to be excessive and that it would serve no useful purpose to set out in this opinion all the testimony on this subject.

There is a pending motion to strike appellant's reply brief from the files. Leave was given appellant, after his oral argument, to cite additional authorities and it was not intended to permit further argument, but in view of the conclusions reached, we conclude to deny that motion.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

6999

23761

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Arthur McKeown, Defendant in error, vs. Mart Murray, Plaintiff in error,	Error to Henderson.

Dibell, P.J.

This is a suit in assumpsit by Arthur McKeown against Mart Murray, brought to recover $2,500. alleged to have been paid under moral duress, and interest thereon and a small sum for rent. McKeown filed a declaration containing a special count and an amended special count concerning the $2,500. and a special count for rent and a count for money had and received and the consolidated common counts, to which defendant pleaded non assumpsit except as to $78. rent, tender of said $78. and set-off. Issue was joined on these pleas. It is not necessary to state the details of the pleadings as to the rent or the set-off or the tender, since no question is here raised, concerning them. It is not necessary to set out the amended and special count for money paid under moral duress, nor is it material whether the details are proved as laid therein for recovery can be had for money obtained under moral duress under the common counts and count for money had and received. Bradford v. City of Chicago, 85 Ill. 349; Pemberton v. Williams, 87 Ill. 105. There was a jury trial and a verdict for plaintiff for $2,831.94. A motion by defendant for a new trial was denied and plaintiff had judgment. This is a writ of error sued out by defendant to review the record.

The right to recover money paid under moral duress is considered and many authorities upon which the rule rests are cited and discussed in County of La Salle v. Simmons, 5 Gilm. 513, and in Bradford v. City of Chicago, supra, and Pemberton v.

Error to [illegible].

Defendant in error,

v.

[illegible] Barry.

Plaintiff in error.

Dibell, P.J.

This is a suit in assumpsit by Arthur McKeown against Mart Murray, brought to recover $3,500, alleged to have been paid under moral duress, and interest thereon and a small sum for rent. McKeown filed a declaration containing a special count and an amended special count concerning the $3,500, and a special count for rent and a count for money had and received and the consolidated common counts, to which defendant pleaded non assumpsit except as to $75. rent, tender of said $75. and set-off. Issue was joined on these pleas. It is not necessary to state the details of the pleadings as to the rent or the set-off or the tender, since no question is here raised, concerning them. It is not necessary to set out the amended and special count for money paid under moral duress, nor is it material whether the details are proved as laid therein for recovery can be had for money obtained under moral duress under the common counts and counts for money had and received. Crawford v. City of Chicago, 88 Ill. 548; Hamerton v. Williams, 97 Ill. 105. There was a jury trial and a verdict for plaintiff for $3,881.64. A motion by defendant for a new trial was denied and plaintiff had judgment. This is a writ of error sued out by defendant to review the record.

The right to recover money paid under moral duress is established and many authorities upon which the rule rests are cited and discussed in County of De Kalb v. Simmons, 5 Bldg. 216, and in Stratford v. City of Chicago, supra, and Hamerton v.

Williams, supra. Two recent cases on the subject are City if Chicago v. N. W. Mut. Life Ins. Co., 218 Ill, 40, and Cook County v. Fairbank, 223 Ill. 578. In the former of said two cases last cited, on p. 44, the court said: "It is the well settled rule of this State that where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, business or property, such payment is, in law, made under duress and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress." There are other cases where the right to recover has been denied under the facts of the particular case, but we think it unnecessary to cite them, because in our view the language above quoted applies to the facts in this case as established by the preponderance of the evidence.

There is a conflict in the evidence on various points but we conclude that the jury were warranted in finding the following to be the material facts. For several years and up to February , 1919, R. W. Bolton, formerly of this State but then living at Pittsburg, Pennsylvania , owned 160 acres of land in Henderson County, Illinois, and Mart Murray was in possession as his tenant. Arthur McKeown, then in ill health, through his wife who acted as his agent, desired to purchase said farm. McKeown and his wife visited Murray on the farm in February, 1919, told him McKeown was considering the purchase of the farm, and asked what his interest was. He told them that he had one more year, and that his term expired March 1, 1920. Thereafter before the end of February McKeown bought the farm of Bolton and obtained a deed therefor which contained the provision that it was subject to the rights of

Williams, supra. Two recent cases on the subject are City of Chicago v. N. W. Mut. Life Ins. Co., 218 Ill. 46, and Cook County v. Fairbank, 222 Ill. 278. In the former of said two cases last cited, on p. 44, the court said: "It is the well settled rule of this State that where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, business or property, such payment is, in law, made under duress and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress." There are other cases where the right to recover has been denied under the facts of the particular case, but we think it unnecessary to cite them, because in our view the language above quoted applies to the facts in this case as established by the preponderance of the evidence.

There is a conflict in the evidence on various points but we conclude that the jury were warranted in finding the following to be the material facts. For several years and up to February , 1919, R. W. Dolton, formerly of this State but then living at Pittsburg, Pennsylvania , owned 180 acres of land in Henderson County, Illinois, and Mert Murray was in possession as his tenant. Arthur McKeown, then in ill health, through his wife who acted as his agent, desired to purchase said farm. McKeown and his wife visited Murray on the farm in February, 1919, told him McKeown was considering the purchase of the farm, and asked what his interest was. He told them that he had one more year, and that his term expired March 1, 1920. Thereafter before the end of March McKeown bought the farm of Dolton and obtained a lease thereafter which contained the provision that it was subject to the rights of

the tenant in possession. On June 21, 1919, McKeown entered into a contract to sell and convey said premises to Harry E. Miller at an advanced price, and agreed to deliver possession on March 1, 1920, and McKeown received part of the purchase price. In the latter part of July, 1919, Miller entered into a contract to sell the farm to one Moffitt for an advance in price and to deliver possession on March 1, 1920. In the latter part of August, 1919, Murray notified Miller that he had a five year extension of the lease and would not deliver possession on March 1, 1920. Miller brought this information to the attention of Moffitt and they consulted lawyers, and afterwards McKeown was advised that unless he delivered possession on March 1, 1920, Moffitt would sue him for damages and claim $8,000, and Miller would sue him for damages and claim a like amount. On September 2, 1919, McKeown and wife, Murray, Miller and Moffitt met at a bank in Stronghurst in said county, Murray remained in one room and McKeown and wife in another, and Widmer, the banker, and Miller went from one room to the other trying to bring about some adjustment which would cause the tenant to vacate the premises on March 1, 1920, and enable Moffitt to take possession. On August 29, 1919, Murray had filed for record in the office of the recorder of deeds for that county his original lease and an endorsement thereon, dated September 14, 1918, and signed by Bolton and Murray, extending Murray's lease from Bolton for five years from September 14, 1918. It also was a fact that in the original lease between Bolton and Murray was the following provision: "This contract drawn for five years but either party may cancel the contract prior to the 15th of August of any year by paying the other party one hundred dollars ($100.00) cash, same to take effect

the tenant in possession. On June 23, 1939, McKown entered into a contract to sell and convey said premises to Harry E. Miller at an agreed price, and agreed to deliver possession on March 1, 1940, and McKown received part of the purchase price. In the latter part of July, 1939, Miller entered into a contract to sell the farm to one Moffitt for an advance in price and to deliver possession on March 1, 1940. In the latter part of August, 1939, Murray notified Miller that he had a five year extension of the lease and would not deliver possession on March 1, 1940. Miller brought this information to the attention of Moffitt and they consulted a lawyer, and afterwards McKown was advised that unless he delivered possession on March 1, 1940, Moffitt would sue him for damages and claim $6,000, and Miller would sue him for damages and claim a like amount. On September 6, 1939, McKown and wife, Murray, Miller and Moffitt met at a bank in Stroughsburg in said county. Murray remained in one room and McKown and wife in another, and Kimmer, the banker, and Miller went from one room to the other trying to bring about some adjustment which would cause the tenant to vacate the premises on March 1, 1940, and enable Moffitt to take possession. On August 22, 1939, Murray had filed for record in the office of the recorder of deeds for that county the original lease and an agreement between, dated September 14, 1939, and signed by McKown and Murray, extending Murray's lease from Dolton for five years from September 14, 1940. It also was a fact that in the original lease between Dolton and Murray was the following provision: "This contract shall for five years but either party may cancel the contract prior to the 15th of August of any year by paying the other party one hundred dollars ($100.00) cash, and to take effect

March 1st of the following year." At the meeting in the bank Murray insisted that he would remain in possession. It seems to have been assumed by Murray that under that provision unless he was paid $100 before August 15, 1919,, he could remain in possession under the lease for another year after March 1, 1920. We think this not the true construction of the clause above quoted. We are of the opinion that it was not the meaning of that provision that if Bolton did not pay Murray $100 before August 15, 1919, that Murray could hold still another year; that the quoted clause was meant to apply to a desire to end the lease before it would terminate by its terms, but that the provision quoted could not be availed of to extend the lease beyond March 1, 1920. It is also to be observed that it is dated September 14, 1914, and is for five years and does not anywhere say in terms that the lease is to begin or end on March first, but as it is a lease of a farm and the parties have interpreted it as running to March first, and as such leases usually begin at that time, we think the lease should be treated as the parties intended it as beginning on March first. Moffitt told Miller and Widmer that he demanded $2,500 damages and that he would not vacate the premises unless that was paid. This was conveyed to McKeown and wife. McKeown declared that he had a right to the possession on March 1, 1920, under the circumstances stated, and refused to pay any damages whatever. The fact that Moffitt and Miller, respectively, intended to hold McKoewn liable for damages unless possession was given on March 1, 1920, was well known to Murray and was communicated to McKeown and wife. After much discussion and controversy, McKeown said: "This has got to stop; it is killing me." He was very sick at the time. His wife then assented and McKeown and wife gave their note for $2,500 payable to Murray and

March 1st of the following year." At the meeting in the bank Murray insisted that he would remain in possession. It seems to have been assumed by Murray that under contravention unless he was paid $100 before August 15, 1919, he could remain in possession under the lease for another year after June 1, 1920. We think this not the true construction of the clause above quoted. We are of the opinion that it was not the meaning of that provision that if Bolton did not pay Murray $100 before August 15, 1919, that Murray could hold until another year; that the quoted clause was meant to apply to a desire to end the lease before it would terminate by its terms, but that the provision quoted could not be availed of to extend the lease beyond March 1, 1920. It appears to be conceded that it is dated September 14, 1914, and is for five years and does not anywhere say in terms that the lease is to begin on and on March first, but as it is a lease of a farm and the parties have interpreted it as running to March first, and as such leases usually begin at that time, we think the lease should be treated as the parties intended it as beginning on March first. Moffitt told Miller and Widmer that he demanded $3,500 damages and that he would not vacate the premises unless that was paid. This was conveyed to McKeown and wife. McKeown declared that he had a right to the possession on March 1, 1920, under the circumstances stated, and refused to pay any damages whatever. The fact that Moffitt and Miller, respectively, intended to hold McKeown liable for damages unless possession was given on March 1, 1920, was well known to Murray and was communicated to McKeown and wife. After much discussion and controversy, McKeown said: "This has got to stop; it is killing me." He was very sick at the time. The wife then assented and McKeown and wife gave their note for $2,400 payable to Murray and

Murray executed an instrument agreeing to deliver possession on March 1, 1920. Murray sold the note before maturity and McKeown paid it to the holder at maturity, as he was legally bound to do. He then brought this suit to recover the money. McKeown had a right to rely and act upon the statement of Murray that his term ended March 1, 1920. McKeown bought and paid for the farm in reliance on that statement and he was not liable to pay Murray anything for afterwards agreeing to deliver up possession at that time. The payment was forced from him by the wrongful assertion of such a right after he had entered into contract relation with others which necessarily would subject him to liability to heavy damages. These facts, which the jury were warranted in finding from the evidence, justified a verdict in his favor for $2,500 and interest thereon at five percent from the time it was paid.

It is argued that McKeown should have paid $100. to Murray before August 15, 1919, for his own protection, and in this connection it is urged that the court erred in not admitting in evidence a letter offered by defendant, dated July 18, 1919, from Mrs. Bolton to Mrs. McKeown, in which Mrs. Bolton told Mrs. McKeown that Murray must be paid $100. during that summer in order that he vacate the farm by the first of March following, and that Murray could stay on the farm another year unless that payment was made at the date named in the lease. As already stated, we construe the language of the lease differently from what Mrs. Bolton did in that letter. Besides, McKeown had bought and paid for the farm on the strength of the statement made to him by Murray that his term would end March 1, 1920, without any suggestion of any such provision under which his term might be extended for another year, and McKeown had not seen a copy of that lease until after he had bought and paid for the farm, and his rights as to the tenant could not be

Murray executed an instrument agreeing to deliver possession on March 1, 1900. Murray took the note before maturity and Robson paid it to the holder at maturity, so he was logically bound to do. He then demanded this suit to recover the money. Robson had a right to rely and act upon the statement of Murray that his term would expire March 1, 1900. Robson bought and paid for the farm in reliance on that statement and to pay not liable to pay Murray anything for different; prevent to deliver up possession at that time. The evidence has shown that the wrongful assertion of such a right after he had entered into contract relation with others which necessarily would subject him to liability to their damage. The facts, which the jury were warranted in finding from the evidence, justification existed in the amount of $2,000 was liquidated by thereon at five percent from the time it was paid.

It is argued that Robson should have paid $500. to Murray before August 15, 1899, for his own protection, and in this connection it is urged that the court erred in not admitting in evidence a letter offered by defendant, dated July 19, 1899, from Mr. Smith to Mrs. Robson, in which Mr. Robson told Mrs. Robson that Murray must be paid $500. Having that money in order that he vacate the farm by the first of March following, and that Murray could stay on the farm another year unless that payment was made at the date named in the letter. As already stated, we construe the language of the lease differently from Mr. Smith did in that letter. Further, Robson had bought and paid for the farm on the strength of the assurance made to him by Murray that his term would end March 1, 1900, without any suggestion of any such provision which Murray had a right to extend for another year, and Robson had not seen a copy of that lease until after he had bought and paid for the farm, and his rights as to the lease could not be

affected by a letter by Mrs. Bolton to Mrs. McKeown in the following July and after he had sold to Miller and contracted to deliver possession on March 1, 1920. Complaint is made of the evidence of Miller and another witness about the statements Moffitt and Miller and this other witness made to McKeown that he would be sued by Moffitt and by Miller and held responsible for heavy damage if he did not deliver possession on March 1, 1920. We think it shown by the evidence that this information was carried back and forth between the room in the bank where Murray was and the room where the McKeowns were. Also, we think it was competent to show the state of mind of McKeown when he finally promised to pay the sum Murray demanded and for which he declared himself not at all liable. But further, than that, the evidence could not harm Murray for it was obvious that McKeown would be liable to serious damages if he failed to fulfil his contract to deliver possession March 1, 1920.

It is said that the court erred in giving instructions 4, 10 and 11 for McKeown and refusing instruction 9 requested by defendant. Instruction 4 is sustained by City of Chicago v. N. W. Mut. Life Ins. Co., supra. We approve instructions 10 and 11. No. 9, requested by Murray and refused, contained this expression: " if you find from the evidence any statements would have been made by the defendant Murray as to his rights in the land," etc. It would have been error to set the jury to speculating what statements "would have been made" by Murray, and the form of that expression is sufficient to condemn the instruction, if it contained no other vices.

We find no reversible error in the record. The judgment is therefore affirmed.

affected by a letter by Mrs. Bolton to Mrs. McKeown in the following July and after he had sold to Miller and contracted to deliver possession on March 1, 1920. Complaint is made of the evidence of Miller and another witness about the statements Moffitt and Miller and this other witness made to McKeown that he would be sued by Moffitt and by Miller and held responsible for heavy damage if he did not deliver possession on March 1, 1920. We think it shown by the evidence that this transaction was carried back and forth between the room in the bank where Murray was and the room where the McKeowns were. Also, we think it was competent to show the state of mind of McKeown when he finally promised to pay the sum Murray demanded and for which he declared himself not at all liable. But further, than that, the evidence could not hurt Murray for it was obvious that McKeown would be liable to serious damages if he failed to fulfill his contract to deliver possession March 1, 1920.

It is said that the court erred in giving instructions 4, 10 and 11 for McKeown and refusing instruction 3 requested by defendant. Instruction 4 is sustained by City of Chicago v. N. W. Mut. Life Ins. Co., supra. We approve instructions 10 and 11. No. 3, requested by Murray and refused, contains this expression: " if you find from the evidence my statements would have been made by the defendant Murray as to his rights in the land," etc. It would have been error to set the jury to speculating upon observers "would have been made" by Murray, and the form of that expression is sufficient to condemn the instruction. It is unnecessary to cite cases.

We find no reversible error in the record. The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of May in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

7005

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

F. E. Will, appellee,)
vs.) Appeal from Lake.
City of Zion, appellant.)

DIBELL, P. J.

On November 4, 1920, F. E. Will filed a petition for a mandamus against the city of Zion in the Lake Circuit Court. The City filed an answer. While mandamus is a common law action and an answer is not an ordinary common law pleading, it is permitted by the Mandamus Act. To said answer plaintiff filed what he designates a first and a second replication, which replications fail in several respects to comply with the rules governing common law pleading. Defendant filed what it calls a rejoinder to the first replication and a rejoinder to the second replication. These rejoinders do not comply with the rules governing common law pleading. Plaintiff demurred to each of said rejoinders. Said demurrers were sustained. Plaintiff moved that a writ of mandamus issue on the pleadings. Said motion was granted and a mandamus was awarded. This is an appeal by defendant from that judgment.

Appellant contends that the court should have ruled defendant to plead further and, as it did not do so, and as defendant did not elect to stand by its rejoinders, the judgment should be reversed. Defendant did not ask leave to amend its rejoinders or to file further rejoinders. Under the decision in C. C. C. & St. L. Ry. Co., v. Bozarth, 91 Ill. App. 68, on p. 73, we conclude that the action of the court in that respect is not error of which defendant can now complain. We also conclude to ignore the apparent defects in the pleadings and to consider the matters which we think are conclusive.

The litigation related to a sewer in an alley just north of plaintiff's dwelling and to another sewer built by Wilbur Glenn Voliva in the same alley for the use of a college building on land o

building on land owned by Voliva on the north side of said alley. Plaintiff had been connected with the sewer next to him for quite a number of years and Voliva had been connected with the sewer put in by him about a year when this suit was begun, The sewer with which plaintiff was connected will be called the old sewer and Voliva's sewer will be called the new sewer. While the petition for mandamus does not expressly say so, the other pleadings show that the old sewer was a private sewer. Plaintiff had a septic tank on his premises where he lived, which received the sewage and drainage from his home and from which tank its contents were discharged into the old sewer, with which many other people were also connected. When plaintiff installed this septic tank two officers of the city inspected it and approved it. In 1920 the city condemned the old sewer as unsanitary, etc., and directed plaintiff to disconnect his premises therefrom. At the same time Voliva asked the city council to permit him to lay a private sewer in said alley to drain the college building on his premises, and the city adopted an order giving him such permission under certain provisions, among which was a grant to Voliva of the right to permit other individuals to connect therewith upon such arrangements with other property owners as he and they might make. The prayer of the petition for mandamus was that the city be required to restore the old sewer as it was prior to October 12, 1920, and to repair any breaks therein, and to restore the outlet of the same and to restore the connections between plaintiff's tank and said sewer as it was on October 12, 1920. The mandamus awarded in the final judgment commanded the city to connect plaintiff's tank with the new sewer, and that, if the city did not do so within ten days after demand in writing, plaintiff cause the connection to be made, and that

the city permit plaintiff to make the same; and that Benjamin Thacker, city engineer of the city of North Chicago, be a referee and be vested with all the power and authority he would have had if the city was causing said new sewer to be built and paid for by special assessment and he had been appointed by the city to spread the assessment for the cost of the sewer; and that said referee should determine the amounts of general benefits which should have been assessed against the city and against plaintiff's lot, and that he return to the court a certificate of the amount that should be assessed against plaintiff's lot. There was also a judgment for costs in favor of plaintiff and against the city. It will be seen that this judgment is a wide departure from the prayer of the petition, which only related to the old sewer. To this appellee replies that he asked for that relief as to the new sewer in his second replication, and that such prayer in the second replication should be considered as a new assignment. Without considering whether it should be so treated, it related to property of Voliva and asked that the city decide upon a method of compensating Voliva for the cost of the construction of his new sewer and it is obvious that the court could have no jurisdiction, either to determine what compensation should be paid to Voliva or to order the city to connect appellee with Voliva's new sewer when Voliva was not a party to this suit. It follows that much of the judgment was necessarily without the jurisdiction of the court. We are unable to see what authority the court had to appoint a referee and to bestow upon him the authority to spread a special assessment upon any property for the cost of the new sewer constructed by Voliva a year before this suit was begun. The judgment also does not indicate what is to be done after such an assessment has been returned to the court. It does not direct the referee to return the amount of the assessment against the city but only the amount of the assessment against plain-

the city permit plaintiff to make the issue; and that defendant
Wheeler, city engineer of the city of North Chicago, be a
referee and be vested with all the power and authority he would
have had if the city was seeking said the sewer to be built and
paid for by special assessment and he had been appointed by the
city to spread the assessment for the cost of the sewer; and
that said referee should hold back the amounts of several lots-
(the which should have been assessed against the city and against
plaintiff's lot, and that he return to the court a certificate
of the amount that should be assessed against plaintiff's lot.
There was also a judgment for costs in favor of plaintiff and
against the city. It will be seen that this judgment is a
wide departure from the prayer of the petition, which only
related to the old sewer. To this appellee replies that he
asked for that relief as to the new sewer in his second modi-
fication, and that such prayer in the second modification should
be considered as a new assignment. Without considering whether
it should be so treated, it related to property of Volini and
asked that the city decide upon a method of compensating Volini.
For the cost of the construction of his new sewer and it is
obvious that the court could have no jurisdiction, either to
determine what compensation should be paid to Volini or to order
the city to connect appellee with Volini's new sewer than Volini
was not a party to this suit. It follows that much of the
judgment was necessarily without the jurisdiction of the court.
We are unable to see what authority the court had to appoint a
referee and to bestow upon him the authority to spread a special
assessment upon any property for the cost of the new sewer con-
structed by Volini. A year before this suit was begun. The
judgment also does not indicate what is to be done with such
an assessment had been returned to the court. It does not
direct the referee to return the amount of the assessment against
the city but only the amount of the assessment against plain-

tiff's lot. It does not seek to retain any jurisdiction over the cause, and apparently the making of said assessment by the referee and its return to the court is a matter not to be further acted upon by the court. We regard it as also clear that the court had no jurisdiction to compel the city to make a connection between plaintiff's tank and Voliva's private sewer. As the old sewer was a private sewer, appellee apparently has no greater rights in the old sewer than Voliva has in his new private sewer, and each of them have no rights in the private sewer of the other. It does not appear that appellee has applied to Voliva to be connected with his new sewer or has sought to ascertain what compensation he ought to pay Voliva therefor under the order entered by the city.

Moreover, a mandamus will not be awarded unless the right thereto is clear, nor unless the party applying for it shows a clear obligation of the party against whom the writ is sought to do the thing which the petitioner seeks. It will not be awarded in a doubtful case, but only where the right of the relator is clear and the party sought to be coerced is bound to act. This is laid down in many cases cited in People v. Blair, 292 Ill. 139. The city had condemned the old sewer as unsanitary and defective. There is nothing in these pleadings to show that it was not justified in this condemnation. There is nothing in these pleadings to show that the city was bound to repair the old sewer and to restore it to usefulness, nor that it had any funds under its control with which to make such repairs. The pleadings show other people connected with said old sewer and interested therein, and they are not made parties. The pleadings do not show any right in appellee to use the new sewer. Taking the showing made at its best for appellee, a clear legal right to any relief in this case against the city does not appear.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of June in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

6941

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6948 No. 2.

William Lohmar, appellee,)
vs.) Appeal from Grundy.
John Ross, et al. appellants.)

JONES, J.

This is an action by the appellee, William Lohmar, against John Ross and Bert Nicholson, partners, doing business under the firm name of Ross & Nicholson, and the Joliet Motor Company, appellants, for fraud and deceit in selling a Ford tractor, plow and disk. It is claimed that the defendants to secure the sale of the machinery to the plaintiff, assured the plaintiff that it was new machinery and he thereupon paid $1,055.00 for it when in fact the tractor was not new but had been used as a demonstrator. The plaintiff obtained a verdict against all of the defendants in the sum of $800.00. Separate motions for a new trial were made by Ross and Nicholson and the Joliet Motor Company. Both were overruled and a judgment was entered on the verdict.

The plaintiff, William Lohmar, lived in Will County, which was territory of the Joliet Motor Company for the sale of Fordson tractors. The plaintiff went to Ross & Nicholson at Coal City to buy a Fordson tractor, plow and disk. Ross & Nicholson had that vicinity as agents in Grundy County but not in Will County. Ross and Nicholson had no unsold tractor on hand and Ross called the Joliet Motor Company by telephone. He talked first with Mr. Gallagher of that company and afterwards with Mr. Barnes, the general manager. He stated to Barnes that he had a customer who wished to buy a Fordson tractor, plow and disk and asked whether the Company could fill such an order. Upon receiving a reply in the affirmative, he inquired how

William Kohmer, appellee,

vs.

John Hoes, et al. appellants.)

(Appeal from Grundy.)

Filed, 1.

This is an action by the appellee, William Kohmer, against John Hoes and Jack Nicholson, partners, doing business under the firm name of Hoes & Nicholson, and the Joliet Motor Company, appellants, for fraud and deceit in selling a Ford tractor, plow and disk. It is claimed that the defendants to secure the sale of the machinery to the plaintiff, assured the plaintiff that it was a machinery and be thereupon paid $1,000.00 for it when in fact the tractor was not new but had been used as a demonstrator. The plaintiff obtained a verdict against all of the defendants in the sum of $800.00. Separate motions for a new trial were made by Hoes and Nicholson and the Joliet Motor Company. Both were overruled and a judgment was entered on the verdict.

The plaintiff, William Kohmer, lived in Will County, which was territory of the Joliet Motor Company for the sale of Fordson tractors. The plaintiff went to Hoes & Nicholson at Coal City to buy a Fordson tractor, plow and disk. Hoes & Nicholson had that vicinity as agents in Grundy County but not in Will County. Hoes and Nicholson had no tractor on hand and Hoes called the Joliet Motor Company by telephone. He talked first with Mr. Gallagher of that company and afterwards with Mr. Burton, the general manager. He stated to Burton that he had a customer who wished to buy a Fordson tractor, plow and disk and asked whether the Company would fill such an order. Upon receiving a reply in the affirmative, he inquired how

much Ross & Nicholson would receive for making the sale. There is a dispute regarding Barnes' reply, Ross saying that he told him the usual five per cent commission, while Barnes' testimony is that he told him five per cent off or the usual five per cent. After this conversation Ross discussed the matter with the appellee who said that he would take the machinery. Thereupon Ross again called Barnes and told him that he had made a sale. The next day Ross went to Joliet to get the outfit and was informed by Barnes that the tractor was a demonstrator. The price of the tractor alone was $780.00. Ross gave Barnes his check for $742.60, took a receipted bill which set forth "commission $37.40, balance due $742.60." Later Ross got the plow and disk and took a similar receipted bill showing commission of $13.37 given to Ross by Barnes, and the payment by Ross to Barnes of the balance of $261.63.

The tractor, disk and plow were delivered to the appellee by Ross & Nicholson. The tractor did not prove satisfactory to the appellee and he demanded a new one instead of the old one. Ross & Nicholson made attempts to remedy the defects in the tractor as did also the Joliet Motor Company, both contending that the tractor was injured by the appellee's son, who was not skilled in the operation of tractors. Subsequently this suit was filed.

~~The~~ Appellee contends that Ross & Nicholson were the agents of the Joliet Motor Company; that Ross & Nicholson made false representations with respect to the tractor and that the Joliet Motor Company is liable for such representations as well as Ross & Nicholson. Ross & Nicholson also contend that they were the agents of the Joliet Motor Company and on the trial offered evidence to establish such agency. The Joliet Motor Company, however, insists that the

much Rose & Nicholson would receive for making the sale.

There is a dispute regarding Barnes' reply, Rose saying that he told him the usual five per cent commission, while Barnes' testimony is that he told him five per cent off or the usual five per cent. After this over-ration Rose discussed the matter with the partners who said that he would take the machinery. Thereupon Rose again called Barnes and told him that he had made a sale. The next day Rose went to Joliet to get the outfit and was informed by Barnes that the tractor was a demonstrator. The price of the tractor alone was $780.00. Rose gave Barnes his check for $[illegible].00, took a receipted bill which set forth "commission $[illegible].10, balance due $[illegible].80." Later Rose got the plow and disk and gave a similar receipted bill showing commission of $[illegible] given to Rose by Barnes, and the payment by Rose to Barnes of the balance of $[illegible].64.

The tractor, disk and plow were delivered to the appellee by Rose & Nicholson. The tractor did not prove satisfactory to the appellee and he demanded a new one instead of the old one. Rose & Nicholson made efforts to remedy the defects in the tractor on the plea the Joliet by appellee's son, who was not skilled in the operation of tractors. Subsequently this suit was filed.

The appellee contends that Rose & Nicholson were the agents of the Joliet Motor Company; that Rose & Nicholson made false representations with respect to the tractor and that the Joliet Motor Company is liable for such representations as well as Rose & Nicholson. Rose & Nicholson also contend that they were the agents of the Joliet Motor Company and on the trial offered evidence to establish such agency. The Joliet Motor Company, however, insists that the

transaction between it and Ross and Nicholson was a completed sale of the tractor to them and that the company is in no wise bound by any representations that they may have made to the appellee. The Company take the position that the judgment ought to be reversed as to it and affirmed as to Ross & Nicholson. Upon an examination of the record we find no reversible error in the admission or exclusion of evidence effecting the question of agency. From a thorough consideration of all the evidence we are of the opinion that the Joliet Motor Company did not sell the tractor, plow and disk to appellee, Lohmar and did not make any untruthful representations to him; and that this action cannot be maintained against the Joliet Motor Company. We are further of the opinion that the transaction between the Joliet Motor Company and Ross & Nicholson was a sale of the tractor, plow and disk to them; that they were not the subagents of the Joliet Motor Company; and that they could not create any liability against the Company by any representations they may have made. Although the profit to Ross& Nicholson is called a commission, nevertheless, the purchase price of the implements is given in statements to Ross & Nicholson who thereupon paid for the machinery. There is nothing to indicate that Ross & Nicholson had a right to surrender the property to the Joliet Motor Company and receive their money back or that the Joliet Motor Company could recover the property in the event Ross & Nicholson failed to make a sale. A sale is defined to be an agreement whereby one party called the seller, transfers to the other party called the buyer, the property in goods for a consideration called the price which the buyer pays or agrees to pay. (People vs. Law and Order Club 203 Ill. 127; Close vs. Browne 230 Ill. 236; Benjamin on Sales, Sec. 1 and 3;

transaction between it and Ross and Nicholson was a con-
plated sale of the tractor to them and that the company is
in no wise bound by any representations that they may have
made to the appellee. The Commonwealth takes the position that
the judgment ought to be reversed as to it and affirmed as
to Ross & Nicholson. Upon an examination of the record
we find no reversible error in the admission or exclusion
of evidence affecting the question of agency. From a
careful consideration of all the [illegible] we are of the
opinion that the Joliet Motor Company did not sell the
tractor, plow and disk to appellee, Lohman and did not make
any material representations to him; and that the Lohman
cannot be maintained against the Joliet Motor Company.
We are further of the opinion that the transaction between the
Joliet Motor Company and Ross & Nicholson was a sale of the
tractor, plow and disk to them; that they were not the sub-
agents of the Joliet Motor Company; and that they could not
create any liability against the Company by any representa-
tions they may have made. Although the result to Ross &
Nicholson is unlike a consideration, nevertheless, the purchase
price of the implements is given in exchange to Ross &
Nicholson who thereupon paid for the machinery. There is
nothing to indicate that Ross & Nicholson had a right to
surrender the property to the Joliet Motor Company and re-
coive their money back or that the Joliet Motor Company
could recover the property in the event Ross & Nicholson
failed to make good. It cannot be claimed to be an agreement
whereby one party undertook the seller, therefore to be other
party called the buyer, the property in order to accomplish
tion called the price which the buyer was to pay to per-
(people as. Law and Gamer also ADC Inc. 147; Jones vs.
[illegible] 147, 148; Benjamin on Sales, 7th, 1.[illegible] 3;

Tiedeman on Sales, Sec. 1.) Tested by this definition the evidence in this case shows the seller, the Joliet Motor Company transferred to the buyer, Ross & Nicholson, the property in the tractor, disk and plow for the consideration of $1,055.00 less five per cent.

Because of the views of the court this case must be reversed. Since the judgment is a unit, if reversed as to one defendant it must be reversed as to all. (Enis vs. Capps 12, Ill. 255; Supreme Lodge, etc. vs. Goldberg 175 Ill. 19; Henning vs. Sampsell 236 Ill. 375; Ird et al, vs. Rapid Transit Company of Illinois et al. 206 Ill. App. 351; Kinlock Long Distance Telephone Company vs. Alton B. & E. 210 Ill. App. 540.)

The case will, therefore, be reversed as to the Joliet Motor Company and reversed and remanded as to Ross & Nicholson with a finding of fact that the defendants Ross & Nicholson were not the agents of the Joliet Motor Company and that the Joliet Motor Company is not liable in this action. Because the case must be remanded, for further proceddings, this court expresses no opinion as to the ultimate liability of the defendants, Ross & Nicholson.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of May in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson,
Clerk of the Appellate Court.

6975

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

2378

6975 No. 8

J. W. Wallace, Executor, etc., Defendant in Error, vs. Mary J. Neil, et al, Plaintiffs in Error.	Appeal from the Circuit Court of Warren County.

JONES, J.

C. V. Wallace died testate June 5th, 1917, and letters testamentary were issued to J. W. Wallace. The executor found among the papers of the testator a promissory note in the sum of $200.00 made by Mary J. Neil payable to E. B. Crenshaw, one of the plaintiffs in error, and secured by a mortgage upon property owned by Mary J. Neil. The Mortgage was signed by Mary J. Neil and her husband, George W. Neil. The executor filed a bill in the Circuit court of Warren County to foreclose the mortgage, making Mary J. Neil, George W. Neil and the Monmouth Homestead & Loam Association, defendants. The last named defendant held a prior mortgage upon the presmises. The executor also had in his possession a note for $20,00 payable to the testator signed by the plaintiff in error, E. B. Crenshaw. Crenshaw filed a petition asking leave to intervene in the suit. The leave was granted and by order of the court after answer filed by Crenshaw the petition stood as a cross bill. The executor filed his answer thereto. The cross bill sets up that Crenshaw is the sole owner of the aforesaid $200.00 note and mortgage; that they had been delivered to C. V. Wallace in his lifetime to secure the payment of the said $20.00 note made by him to Wallace and now held by the executor. On the hearing Mary J. Neil and George W. Neil, makers of the note and mortgage were defaulted but Mary J. Neil joins E. B. Crenshaw as plaintiff in error.

Because the regular master in chancery was interested

J. W. Wallace, Executor, etc., Defendant in Error, vs. Mary J. Neil, et al, Plaintiffs in Error.	Appeal from the Circuit Court of Warren County.

JOHNSON, J.

C. W. Wallace died testate June 8th, 1917, and letters testamentary were issued to J. W. Wallace. The executor found among the papers of the testator a promissory note in the sum of $200.00 made by Mary J. Neil payable to E. E. Crenshaw, one of the plaintiffs in error, and secured by a mortgage upon property owned by Mary J. Neil. The Mortgage was signed by Mary J. Neil and her husband, George W. Neil. The executor filed a bill in the Circuit court of Warren County to foreclose the mortgage, making Mary J. Neil, George W. Neil and the Wabash Commercial & Loan Association, defendants. The last named defendant held a prior mortgage upon the premises. The executor also had in his possession a note for $80.00 payable to the testator signed by the plaintiff in error, E. E. Crenshaw. Crenshaw filed a petition asking leave to intervene in the suit. The leave was granted and by order of the court after answer filed by Crenshaw the petition stood as a cross bill. The executor filed his answer thereto. The cross bill sets up that Crenshaw is the sole owner of the aforesaid $200.00 note and mortgage; that they had been delivered to C. W. Wallace in his lifetime to secure the payment of the sum $120.00 note made by him to Wallace and now held by the executor. On the hearing Mary J. Neil and George W. Neil, makers of the note and mortgage were defaulted but Mary J. Neil joins E. E. Crenshaw as plaintiff in error.

Because the regular master in chancery was interested

in the prior encumbrance on the premises, the court appointed L. E. Murphy as special master in chancery. He took the evidence at various times and made a report thereof to the court without giving an opportunity to the plaintiff in error Crenshaw to file objections thereto and the court sent the report back to said special master to permit such objections to be filed. Crenshaw filed objections which were overruled and the special master filed his report finding in favor of Wallace and against Crenshaw as to the ownership of the note for $200.00. The special master had never taken an oath nor filed a bond as special master under the act of 1917, but with this second report he filed an oath. The court approved the report of testimony and there was a decree foreclosing the mortgage for the benefit of Wallace, executor. Crenshaw and Mary J. Neil sued out of this court a writ of error to review the record.

It is urged that the proceedings before the special master were void because he had neither taken an oath nor given a bond as special master. Crenshaw appeared before the special master at various times to take testimony, appeared before the circuit court to get the report re-committed to the special master for objections and thereafter when the report was re-committed to the special master, filed many objections to it but did not make the objection that no oath or bond was filed. The case of Pardridge vs. Ryan 134 Ill, 247 is one for an accounting. The cause was referred to an auditor to take testimony and state the account. The auditor failed to take the oath prescribed by statute. The question raised was whether or not the taking of the oath prescribed by the statute is a prerequisite to jurisdiction or whether there may be a waiver of such oath by the parties. The court said "The weight

in the prior encumbrance on the premises, the court appointed L. E. Murphy as special master in chancery. He took the evidence at various times and made a report thereof to the court without giving an opportunity to the plaintiff in error Cranshaw to file objections thereto and the court sent the report back to said special master to permit such objections to be filed. Cranshaw filed objections which were overruled and the special master filed his report finding in favor of Wallace and against Cranshaw as to the ownership of the note for $300.00. The special master had never taken an oath nor filed a bond as special master under the act of 1917, but with this second report he filed an oath. The court approved the report of testimony and there was a decree foreclosing the mortgage for the benefit of Wallace, assignee. Cranshaw and Mary J. Hall sued out of this court a writ of error to review the record.

It is urged that the proceedings before the special master were void because he had neither taken an oath nor given a bond as special master. Cranshaw appeared before the special master at various times to take testimony, appeared before the circuit court to get the report re-submitted to the special master for objections and correction when the report was re-submitted to the special master, filed many objections, to it but did not make the objection that no oath or bond was filed. The case of Partridge vs. Ryan 198 Ill. 247 is cited as controlling. The cause was referred to an auditor to take testimony and state the account. The auditor failed to take the oath prescribed by statute. The question raised was whether or not the taking of the oath prescribed by the statute is a prerequisite to jurisdiction or whether there may be a waiver of such oath by the parties. The court said "The weight

of authority is in favor of the position that the oath may be waived. A party ought not to be permitted to introduce testimony and to suffer his adversary to introduce testimony before an auditor, and then, when the findings turn out to be adverse to him, make the objection for the first time that the auditor was not sworn. Thus to lie by, and take the chances of a favorable result, is inequitable in such cases, silence should be regarded as acquiescence. If the objection that the oath had not been administered is made in apt time, it may be cured and time and expense may be saved. It is not sufficient for the defendants to say, that they did not know of the failure to take the oath until after the report was filed. They knew or were bound to know that the law was. The law required the auditor to be sworn before he entered upon his duties. If they intended to insist upon a compliance with this requirement, they should have made known their intention before the duties were entered upon. The appointment of the court is the source of the auditor's jurisdiction, and his failure to be sworn may be waived by the parties, as it was waived in the case at bar." The holding in the Ryan case is followed in the case of Garrity vs. Hamburger Co. 136 Ill. 499. We can not distinguish these cases in principle from the case at bar and we hold that Crenshaw by his action in appearing before the special master to take testimony, by his appearance before the circuit court to have the report of the special master re-committed to the special master for the filing of objections to the report and by filing objections to the report without making this specific objection, waived the taking of the oath by the special master.

No error in computation is assigned by the plaintiff in error, Mary J. Neil. By her default she admits liability under the note and mortgage. She would therefore be in no position to complain that the oath was not taken by the special

of authority is in favor of the position that the oath may be waived. A party ought not to be permitted to introduce testimony and to muzzle his adversary to introduce testimony before an auditor, and then, when the findings come out, to be allowed to say, make the objection for the first time that the witness was not sworn. Thus to lie by, and take an chance of a favorable result, is inequitable in such cases, and not should be tempted as an equitable course. If the objection that the oath had not been administered is made in due time, it may be and the and equitable may be say it. It is not sufficient for the defendants to say, that they did not know it the failure to take the oath until after the report was filed. They knew or are bound to know that the law was. The law requires the auditor to be sworn before he entered upon his duties. It may injurious to insist upon a technicality [illegible], they should have made known their intention before the duties were entered upon. The opinion of the court of the issues of the authority jurisdiction, and its failure [illegible] as it was waived in the [illegible]." The holding in the Dunn case is followed in the case of Gravity vs. Hamburger Co. 158 Ill. 488. "We can not distinguish these cases in principle from the case at bar and we hold that [illegible] by his action in appearing before the special master in the hearings, by his appearance before the circuit court to have the report of the special master re-committed to the special master for the filing of objections to the report and by filing objections to the report without making this specific objection, waived the taking of the oath by the special master.

No error in computation is alleged by the plaintiff in error, Mary L. Wood. By her demurrer the plaintiff under the note and mortgage. She could interpose in no position to complain that the oath was not taken by the special

master as required by statute. However, the decree orders the payment of the sum of $316.27 by Mary J. Neil and George W. Neil to the complainant within forty days together with costs of suit and in default thereof that the special master make sale of the premises subject to the mortgage of the Monmouth Homestead & Loan Association and directs the distribution of the moneys received from such sale. We are of the opinion that the court should have required the special master to file a bond before making such sale.

It is further urged upon the part of the plaintiff in error, Crenshaw, that the finding of the court that the executor is the owner of the note and mortgage in question is against the weight of the evidence and unwarranted by the evidence. While this court has power to review the evidence in the case and determine whether the findings of the trial court are correct, still we are not authorized to disturb the findings of the master when confirmed by the chancellor unless they are manifestly against the weight of the evidence. (Williams vs. Lindblom 163 Ill. 346; Siegel vs. Andrews & Co. 181 Ill. 350; Treloar vs. Hamilton 225 Ill. 103; North Side Sash & Door Co. vs. Heckt 295 Ill. 515.) In this case there was much conflicting evidence with regard to the ownership of the note and mortgage and we can not say the findings were contrary to the weight of the evidence.

The decree is therefore affirmed in so far as it denies the claims of Crenshaw and provides for a foreclosure in favor of Wallace, but so far as it directs a sale by the special master without his giving a bond, it is reversed and remanded with directions to require the special master to give a bond in a sum double the value of the real estate to be sold and after that bond has been given and approved, the decree for the sale of the real estate in favor of J. W. Wallace, executor for the debt, interest and costs will be entered.

master as required by statute. However, the decree orders the payment of the sum of $318.87 by Mary J. Hall and George W. Hall to the complainant within forty days together with costs of suit, and in default thereof that the special master make sale of the premises subject to the mortgage of the Monmouth Homestead & Loan Association and direct the distribution of the moneys received from such sale. We are of the opinion that the court should have required the special master to file a bond before making such sale.

It is further urged upon the part of the plaintiff in error, Greenslaw, that the finding of the court that the assessor is the owner of the note and mortgage in question is against the weight of the evidence and unwarranted by the evidence. While this court has power to review the evidence in the case and determine whether the findings of the trial court are correct, still we are not authorized to disturb the findings of the master when confirmed by the chancellor unless they are manifestly against the weight of the evidence. (Williams vs. Lindsley 108 Ill. 568; Rigsel vs. Andrews & Co. 181 Ill. 280; Trelson vs. Hamilton 88 Ill. 104; North Side Sash & Door Co. vs. Hoek 98 Ill. 216.) In this case there was much conflicting evidence with regard to the ownership of the note and mortgage and we can not say the finding was contrary to the weight of the evidence.

The decree is therefore affirmed in so far as it denies the claim of Greenslaw and provides for a deficiency in favor of Wallace, but so far as it directs a sale by the special master without his giving a bond, it is reversed with directions to require the special master to give a bond in a sum double the value of the real estate to be sold and after that bond has been given and approved, the decree for the sale of the real estate in favor of J. H. Wallace, assessor for the debt, interest and costs will be entered.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

7006

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7006 No. 33.

Orin O. Ogle and Tom Haney, appellees, vs. Charles H. Ditto, appellant.	Appeal from Circuit Court of Henderson.

JONES, J.

The appelles, Orin O. Ogle and Tom Haney, recovered a judgment in an action of assumpsit against appellant, Charles H. Ditto, for $1160.00 for real estate brokerage commissions. The appellant was the owner of 164 acres of land and on July 13, 1919 the appellee, Tom Haney, had a conversation with the appellant in which he sought to have the appellant list his land with appellees for sale. No definite arrangements were made on this day but on the next day at Keithsburg, Illinois, a conversation was had between appellant and appellees which resulted in an agreement between the parties whereby the appellees were to find a purchaser for appellant's land at a price of $30,000.00. Appellees were to have as their commissions all the land might bring in excess of $30,000.00. Appellees almost immediately interested one Hugh O'Malley and priced the land to him at $190.00 an acre or a total of $31,160.00. After an inspection of the land by O'Malley and his son the former decided to become the purchaser thereof at the price asked and so notified appellees who in turn notified appellant and arranged a meeting among the parties.

When appellant was advised by appellees that the latter thought they had a purchaser, appellant said to them that he desired to have a reservation made in the deed giving him the right for life to hunt upon the premises. Appellees informed him that they would see what could be done about the matter, whereupon appellant replied in substance, that he would

No. 28.

Appeal from Circuit Court of Marshall.

Orin O. Ogle and Jos. Hunter,
appellants,
vs.
Charles H. Otto,
appellee.

(Opinion).

The appellee, Orin O. Ogle and Joe Hunter, procured a judgment in an action of assumpsit against appellant, Charles H. Otto, for $1800.00 for real estate brokerage commissions. The appellant was the owner of the farm of land in question, and the appellee, Joe Hunter, had a conversation with the appellee, Orin Ogle, in which appellee stated to appellant that he could sell the appellant's land with appellees for sale. No formal arrangement was made on this day but on the next day at Peishtigo, Illinois, a conversation was had between appellant and appellees which resulted in an agreement between the parties thereby the appellees were to find a purchaser for appellant's land at a price of $80,000.00. Appellees were to have as their commission, all the land right along in excess of $80,000.00. Appellees almost immediately interested one Hugh O'Malley and placed the land in him at $100.00 an acre or a total of $81,180.00. After an inspection of the land by O'Malley and his lawyer further in prosecuting the purchase (after of the price being and so on) the appellees had in their original agreement, meeting among the parties.

When appellant was arrested by appellees that he (Hunter) thought, they had a purchaser, appellant said to them that he desired to make a reservation with in the land giving him the right for life to hunt, open and fishing. Appellees informed him that they could see that would be done when the sale, whereupon appellant replied in answer, that he would

not let the reservation stand in the way nor let it stop the deal. Appellant denies that he made any such remark but we think the evidence shows that he did. O'Malley was informed by appellees of appellant's desire for the hunting reservation and O'Malley refused to agree that the reservation should be made and appellees so notified appellant. The agreement between the appellant and appellees was oral, and at the time it was made nothing was said about how payment should be made. During the negotiations appellees suggested to appellant that inasmuch as possession of the premises was not to be delivered to the purchaser until the 1st of March next following, some payment down should be made by O'Malley and suggested that it be a sum between $3,000.00 and $4,000.00.

On Thursday, July 17, 1919, all of the parties went to Keithsburg where O'Malley made arrangements with the Keithsburg bank for the necessary money with which to buy the farm, and thereafter on the same day the cashier of the Keithsburg bank, J. Ward Bloomer, was asked to prepare a contract between appellant and appellees for the sale of the land. Bloomer testified that he prepared a contract from the information he received from the talk of the men in the room where the parties were assembled. This contract provided for the sale of the farm at a price of $31,160.00, $3,500.00 of which was to be paid by the giving of a note by O'Malley to appellant due March 1st, 1920 without interest. The remainder of the purchase price was to be paid at the same time. The deed and the premises were also to be delivered then. Appellant says he read over the contract and discovered an error in the description of the land and that he observed that there was no hunting reservation mentioned in the contract. He then stated that he wanted to go over to the Citizens Bank where he had some papers and could obtain a correct description. O'Malley

also stated that he wanted to make another trip to the farm and look it over concerning some fences, the location of which had been described to him by appellant while at the Keithsburg Bank. The parties separated, O'Malley going out to the farm and appellant to the Citizens Bank where he caused a new contract to be written by L. J. Temple, the cashier of that bank. The draft of this contract provided for a cash payment of $3,500.00 instead of a note for that sum. It also contained a hunting reservation. Temple testified that the contract thus prepared by him was a duplicate of the contract prepared by Bloomer with the exception of the description of the premises and the inclusion of the hunting reservation. Appellant signed this contract and left it with Temple. Later appellee, Ogle, went to the Citizens Bank and inspected the said contract. O'Malley never went to that bank to sign it. Later in the same day appellees caused Bloomer to draw another contract containing a correct description of the land but omitting the hunting reservation. Bloomer and appellees state that this contract was a duplicate of the first contract drawn by him with the exception of the corrected description of the land. At the time of the trial the whereabouts of the contract first drawn by Bloomer could not be located and it was a question in dispute whether appellant had consented to the acceptance of a note for $3,500.00 instead of cash. We are of the opinion that the evidence discloses that appellant did consent to accept a note. Not only is such consent indicated by the testimony of the witnesses who were present at the time the first contract drawn by Bloomer was read over in the Keithsburg Bank but it is made more nearly certain by the positive testimony of Bloomer that appellant stated it didn't make any difference to him, the appellant, whether it was a note or cash so long as it was something he could turn into cash any time he wanted to.

Bloomer further testified he replied to appellant that his bank would cash the note any time appellant wanted the money and that the note was good. Appellant upon cross examination stated that he had some talk on Thursday with Bloomer about the note, that there was something said about it; that he didn't remember asking Bloomer about cashing it but he had possibly asked Bloomer if it was good. He also stated that he might have asked Bloomer if he would cash the note for him if he wanted the money and that he believes Bloomer told him he would. We, therefore, conclude that it was a part of the agreement that appellant should accept a note for $3,500.00.

O'Malley testified that after he had made the trip out to the farm on Thursday it was too late to return to Keithsburg and that he did not do so. Appellee, Haney, testified that on the next morning, it being Friday, July 18, he had a telephone conversation with appellant in which appellant stated that O'Malley had not signed the contract by eight o'clock on the night previous, that it would now take $200.00 an acre to buy the farm and that the deal was off. Appellant does not give the same version of the conversation. However, he stated that he told Ogle that the contract would be left at the Citizen's Bank until eight o'clock on Thursday evening for the signature of O'Malley, but that he did not know that he told Ogle if the contract was not signed by eight o'clock the deal would fall through.

The evidence tends strongly to show that on the following Saturday, July 19, appellees took the second contract drawn by Bloomer and signed by O'Malley in duplicate together with a note signed by O'Malley for $3,500.00 payable to appellant March 1st, 1920 to the appellant and asked appellant to accept the note and sign the contract. Appellant declained to

Bloomer further testified he explained to appellant that his bank would cash the note any time appellant wanted the money and that the note was good. Appellant upon cross examination stated that he had some talk on Thursday with Bloomer about the note, that there was something said about it; that he didn't remember asking Bloomer about cashing it but he had possibly asked Bloomer if it was good. He also stated that he might have asked Bloomer if he would cash the note for him if he wanted the money and that he believes Bloomer told him he would. We, therefore, conclude that it was a part of the agreement that appellant should accept a note for $3,500.00.

O'Malley testified that after he had made the trip out to the farm on Thursday it was too late to return to Keithsburg and that he did not do so. Appellee, Ramey, testified that on the next morning, it being Friday, July 17, he had a telephone conversation with appellant in which appellant stated that O'Malley had not signed the contract by eight o'clock on the night previous, that it would now take $500.00 an acre to buy the farm and that the deal was off. Appellant does not give the same version of the conversation. However, he stated that he told Ogle that the contract would be left at the Citizen's Bank until eight o'clock on Thursday evening for the signature of O'Malley, but that he did not know that he told Ogle if the contract was not signed by eight o'clock the deal would fall through.

The evidence tends strongly to show that on the following Saturday, July 18, appellees took the second contract drawn by Bloomer and signed by O'Malley in duplicate together with a note signed by O'Malley for $3,500.00 payable to appellant March 1st, 1930 to the appellant and asked appellant to accept the note and sign the contract. Appellant declined to

do either. According to appellees testimony, the declination was based solely on the ground that the contract did not contain a reservation of the hunting privilege. According to appellant's testimony, he declined to sign that kind of a contract and he claims that he stated to appellees that he had a contract prepared at the Citizens Bank and for them to bring their man and they would complete it. He also says that the note was not tendered to him. The negotiations between appellant and O'Malley were thus terminated.

We cannot say that the jury was not justified from the evidence in finding that appellees produced a purchaser, able, ready and willing to buy appellant's land upon the terms agreed to by him. In fact it appears to us that the evidence strongly preponderates in favor of appellees. It can serve no useful purpose for us to speculate as to the reasons appellant may have had for not wanting to sell his land after appellees had produced a purchaser. It makes no difference what his reasons were. Under the circumstances of this case, he had a legal right to decline to sell his land. He had a right either to declare the deal off or to withdraw his lands entirely from the market but his conduct in doing so did not relieve him of liability to his brokers if they had performed the services for which they were engaged by him. Although appellant does not admit that he told appellee, Haney, the deal was off and that it would now take $300.00 and acre to buy the land, such an admission, even if he had made it, would not affect his rights or liabilities in this case. O'Malley had been produced prior to the date of this alleged conversation over the telephone and was, as the proof clearly shows, able, ready and willing to buy the land at the price and upon the terms given by appellant to his brokers. It would also be useless for us to discuss the question as to whether or not

do either. According to appellees testimony, the location was based solely on the ground that the contract did not contain a reservation of the hunting privilege. According to appellant's testimony, he declined to sign that kind of a contract and he claims that he stated to appellees that he had a contract prepared at the Citizens Bank and for them to bring their man and they would complete it. He also says that the note was not tendered to him. The negotiations between appellant and O'Malley were terminated.

We cannot say that the jury was not justified from the evidence in finding that appellees produced a purchaser, able, ready and willing to buy appellant's land upon the terms agreed to by him. In fact it appears to us that the evidence strongly preponderates in favor of appellees. It can serve no useful purpose for us to speculate as to the reasons appellant may have had for not wanting to sell his land after appellees had produced a purchaser. It makes no difference what his reasons were. Under the circumstances of this case, he had a legal right to decline to sell his land. He had a right either to declare the deal off or to withdraw his lands entirely from the market but his conduct in doing so did not relieve him of liability to his brokers if they had performed the services for which they were engaged by him. Although appellant does not admit that he told appellee, Haney, the deal was off and that it would now take $4000.00 and more to buy the land, such an admission, even if he had made it, would not affect his rights or liabilities in this case. O'Malley had been produced prior to the date of this alleged conversation over the telephone and was, as the proof clearly shows, able, ready and willing to buy the land at the price and upon the terms given by appellant to his brokers. It would also be useless for us to discuss the question as to whether or not

the jury should have deducted from the amount named in their verdict, a discount of seven per cent on $3,500.00 from July 18, 1919 to March 1st, 1920. We have already said that in our opinion the jury properly found that appellant had agreed to accept the note instead of cash and it is equally clear to us that the note which was discussed between Bloomer and appellant, was a note for $3,500.00 bearing no interest from date to maturity. If appellant had agreed to accept such a note in lieu of cash, he has no right to ask for any reduction of appellees commissions because of the fact that the note was not an interest bearing note from date. The evidence does not disclose the fact that the note was not worth its face at the time of the alleged tender, but even if it were not worth its face at that time, the appellant is in no position to complain on this appeal because he cannot first raise that question here. He made no objections on that account in the trial court and he can not be permitted to do so now.

We think the evidence in this case showed that appellant had given appellees thirty days time in which to make sale of the land. But this question is of little importance because they procured O'Malley as a purchaser within a week after their contract with appellant was made and it can not be seriously contended under the evidence in this case that any effort was made to terminate their contract and to withdraw the lands from the market until after appellees had procured a purchaser upon the terms prescribed by the appellant. Neither do we think there was any modification of the contract after it was made affecting the quantum of the estate to be conveyed to the purchaser. It is obvious that the evidence does not even tend to show any such modification.

Under the evidence in this case the instructions of the court are not open to the objections made by appellant.

the jury should have deducted from the amount named in their verdict, a discount of seven per cent on $5,500.00 from July 18, 1919 to March 1st, 1920. We have already said that in our opinion the jury properly found that appellant had agreed to accept the note instead of cash and it is equally clear to us that the note which was discussed between Blackmer and appellant, was a note for $5,500.00 bearing no interest from date to maturity. If appellant had agreed to accept such a note in lieu of cash, he has no right to ask for any reduction of appellee's commissions because of the fact that the note was not an interest bearing note from date. The evidence does not disclose the fact that the note was not worth its face at the time of the alleged tender, but even if it were not worth its face at that time, the appellant is in no position to complain on this appeal because he cannot first raise that question here. He made no objections on that account in the trial court and he can not be permitted to do so now.

We think the evidence in this case shows that appellant had given appellees thirty days time in which to make sale of the land. But this question is of little importance because they procured O'Malley as a purchaser within a week after their contract with appellant was made and it can not be seriously contended under the evidence in this case that any effort was made to terminate their contract and to withdraw the lands from the market until after appellees had procured a purchaser upon the terms presented by the appellant. Neither do we think there was any modification of the contract after it was made affecting the quantum of the profits to be conveyed to the purchaser. It is obvious that the evidence does not even tend to show any such modification.

Under the evidence in this case the instructions of the court are not open to the objections made by appellant.

In our judgment the verdict was fully warranted by the evidence and should not be disturbed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of May in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

6173

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

225 I.A. 6471

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

2379

6973 No. 45

Charles W. Pease, Administrator of the Estate of Warren W. Pease, deceased. appellee.	
vs.	Appeal from the Circuit Court of Winnebago County.
Rockford City Traction Company and Rockford and Interurban Railroad Company. appellants.	

PARTLOW, J.

Warren W. Pease began suit in the circuit court of Winnebago county against the appellants, Rockford City Traction Company and Rockford and Interurban Railway Company to recover damages for personal injuries which he received on July 21, 1914. On February 11, 1915, before the case was tried, Warren W. Pease died and the appellee, who is the administrator of his estate was substituted as party plaintiff. After an amended declaration had been filed, a motion was made by appellants to dismiss the suit. The motion was allowed and the suit was dismissed. On appeal to this court that judgment was affirmed. 204 Ill. App. 120. A certificate of importance was granted and the Supreme Court, 279 Ill. 513, reversed the judgments of this court and of the circuit court, holding that under the pleadings, the suit was improperly dismissed, and that the fourth count of the declaration stated a good cause of action. The case was then tried in the circuit court, and at the close of the evidence on behalf of the appellee, a motion was made to direct a verdict in favor of the appellants, which motion was allowed and judgment was rendered in favor of the appellants for cost and in bar of the action. A writ of error was sued out of this court and the judgment of the circuit court was reversed. 217 Ill. App. 659. Upon the second trial in the circuit court judgment was rendered in favor of the appellee for $2850.00 and from that judgment this appeal was prosecuted.

The evidence shows that the appellants maintained, in

Charles R. Gass, Administrator of the Estate of Warren R. Hence, deceased,

Appellee.

vs.

Bedford City Traction Company and Bedford and Interurban Railroad Company,

Appellants.

Appeal from the Circuit Court of Lawrence County.

THEISEN, J.

Warren R. Hence died on the (illegible) day of (illegible) in Bedford, Indiana, leaving (illegible) Traction Company and Bedford and Interurban Railway Company to recover damages for personal injuries which he received on July 21, 1914. In February 11, 1915, before the case was tried, Warren R. Hence died and the appellee, and is the administrator of his estate and prosecuted at very (illegible). (illegible) been filed, a motion was made by appellants to dismiss the suit. The motion was allowed and the suit was dismissed. On appeal to this court that judgment was affirmed. 204 Ind. App. 140. I certificate of importance was granted and the opinion court, 179 Ind. 111, reversed the judgment of this court and of the circuit court, holding that under the pleadings, the suit was improperly dismissed, and that the fourth court of the decision makes a good cause of action. The case was then tried in the circuit court, and at the close of the evidence on behalf of the appellee, a motion was made to direct a verdict in favor of the appellants, which motion was allowed and judgment was rendered in favor of the appellants for cost and in bar of the action. A writ of error was sued out of this court and the judgment of the circuit court was reversed. 187 Ind. 499. 688. Upon the second trial in the circuit court judgment was rendered in favor of the appellee for $(illegible) and the appellants prosecuted.

The evidence shows that the appellants maintained, in

the city of Rockford, a shop in which their cars were repaired. Warren W. Pease, the deceased, had worked in this shop for four or five years repairing cars. On the night of July 20, 1914, a street car was placed in the shop for repairs, the armature of one of the motors having been blown out. On the next morning, Pease ran the car over the pit on its own power. He took a jack, went into the pit under the car and started to remove the housing from the dead motor. This car had been in service since 1911. It had a single truck, a wooden body, with two motors, two controllers, a double end, and a single truck consisting of four wheels. The framewhich carried the motors was made of steel. There were two rheostats, one on each end of the car. There was a ground cable extending from one end of the car to the other, and a ground wire was soldered to this cable. This ground wire was in the form of a "Y", one branch being fastened to the metal housing of one of the motors and the other to the metal frame. The purpose of this ground wire was to ground the current of electricity and protect the operator of the car from receiving a shock. When Pease got into the pit under the car, he took the lower half of the housing off of the dead motor and disconnected the ground wire above and below the joint of the "Y". He then went to the front end of the car with the controller and attempted to move the car for convenience in further working on it, but the car failed to move. He took the controller to the other end of the car, turned on the electricity and received a severe shock. Immediately after receiving the shock he was found sitting on the floor of the vestibule, or platform, with his head in his hands, in which position he remained for about twenty minutes, after which he got up and walked around. For almost seven months after receiving this shock he was confined to his home and to a hospital. In December, 1914, after an examination, it was determined that he was not suffering from tuberculosis of the lungs, or from tuberculosis in any other part of his body, but it was determined that he had a sarcoma or tumor. He began to cough immediately after the injury and continued to cough until his death. It was

hard for him to get his breath. He began to lose weight and continued to lose weight until the time of his death. He had worked for the appellants seven days a week for about three years but after his injury he practically did no work. He was treated by the company physician, Doctor Franklin, until December, 1914, when Doctor Lofgren commenced to treat him, and continued to treat him until the time of his death. Pease died February 11, 1915, and after his death a post-mortem examination was had, which showed that there was a five pound, round cell connective tissue sarcoma, or tumor, in the mediosterno region, infiltrating about the organs including the heart and lungs. The heart was crowded into the left side of the cavity close to the shoulder and was about half the size it should have been in its normal condition. It had been contracted, but aside from that the heart appeared uninjured and normal. The sarcoma was grayish white in color and covered the lungs, the other blood vessels and the whole inside of the chest.

It is first urged as a ground of reversal that appellants owed no duty to the deceased to provide a properly equipped car for him to work upon; that the deceased was employed to repair cars that were out of order; that it was his duty to make dangerous conditions safe, and simply because the car was out of order that did not constitute such negligence on the part of appellants as would entitle appellee to recover.

The fourth count of the declaration upon which the case was tried alleged that Pease was employed repairing cars, and that the appellants negligently and carelessly permitted the car in question to remain equipped in a dangerous, defective and improper condition, and by and on account of such negligence, certain parts of the car became and were heavily charged with electricity, and while Pease was working on the car, he came in contact with the parts so heavily charged with electricity, and thereby was shocked, bruised, burned and injured externally and internally,

back for him to get his breath. He began to lose weight and continued to lose slightly until the time of his death. He had worked for the municipality over half a week for about three years but after his injury he practically did no work. He was treated by the usual physicians, Doctor Pressley, until December, 1919, when Doctor Lyons commenced to treat him, and continued to treat him until the time of his death. Cause died February 11, 1923, and after his death a post-mortem examination was had, which showed that there was a five pound, round cell connective tissue sarcoma, or tumor, in the mediastenum region, infiltrating about the organs including the heart and lungs. The heart had crowded into the left side of the cavity close to the shoulder and was about half the size it should have been in the normal condition. It had been contracted, but aside from that the heart appeared uninjured and normal. The sarcoma was growing while in color and covered the lungs, the other blood vessels and the whole inside of the chest.

It is first urged as a ground of reversal that a preponderance and no more or the evidence is against the plaintiff's claim for his to work upon; that the evidence was conflicting as to what was out of order; that it was his duty to make dangerous conditions safe, and simply because the car was out of order that did not constitute such negligence on the part of appellants as would entitle appellee to recover.

The fourth count of the declaration upon which the case was tried alleged that cause was employed repairing cars, and that the appellants negligently and carelessly constructed the car in question to remain equipped in a dangerous, defective and improper condition, and by and on account of such negligence, certain parts of the car became and were heavily charged with electricity, and while cause was working on the car, he came in contact with the parts so charged with electricity, and received an electric shock, thereby, caused the injuries complained of.

and as a result of such injuries died.

Prior to the accident the appellants had elected not to come under the provisions of the Workmen's Compensation Act and for that reason, under Section 3 of that act, Laws of 1913, p.339, contributary negligence, assumed risk and the negligent act of a fellow servant, do not constitute a defense in this case. Daly vs. New Staunton Coal Company, 280 Ill. 175; Wendzinski vs. Madison Coal Company, 282 Ill. 32; New Staunton Coal Co. vs. Fromm, 286 Ill. 254.

The first question to be determined is whether the appellants were guilty of the negligence charged in the declaration. When this case was before this court the last time upon appeal, 217 Ill. App. 659, we held that the evidence of the appellee fairly tended to prove the charge of negligence as alleged in the declaration, and that the trial court improperly directed a verdict for appellants. The evidence on behalf of appellee on this appeal is substantially the same as on the former appeal, and therefore the appellee, under the former decision of this court, is entitled to recover, unless the evidence offered on behalf of the appellants was sufficient to overcome the case made on behalf of the appellee. The appellants cite many cases in support of their contention that they owed deceased no duty to furnish him a safe place in which to work, but upon examination it will be found that most of the cases, if not all of them, are cases in which the facts are not like those in this case. None of them were cases where the compensation act had removed the defense of contributory negligence and assumed risk. The Supreme Court, in 279 Ill. 513, held that the declaration in this case stated a good cause of action, and that decision is conclusive and binding as far as this appeal is concerned. If appellants owed no duty to deceased, then the declaration did not state a cause of action, and it must follow that if the declaration did constitute a cause

and as a result of such injuries died.

Prior to the accident the appellants had elected not to come under the provisions of the workmen's compensation act and for that reason, under Section 3 of that act, Laws of 1913, p.389, contributory negligence, assumed risk and the negligence of a fellow servant, is not available a defense in this case. Hartve. Ben Franklin Coal Company, 280 Ill. 174; Wenkelman vs. Midwest Coal Company, 288 Ill. 32; New Staunton Coal Co. vs. Frost, 288 Ill. 488.

The first question to be determined is whether the appellants were guilty of the negligence charged in the declaration. Upon this case we believe there could be but one answer. In Ill. App. 689, we held that the evidence of the appellee fairly tended to prove the charge of negligence as alleged in the declaration, and that the trial court improperly directed a verdict for appellants. The evidence on behalf of appellee on this appeal is substantially the same as on the former appeal, and therefore the appellee, under the former decision of this court, is entitled to recover, unless the evidence offered on behalf of the appellants was sufficient to overcome the case made on behalf of the appellee. The appellants cite many cases in support of their contention that the court should have ordered no duty to furnish him a safe place in which to work, but upon examination it will be found that most of the cases, if not all of them, are cases in which the facts are not like those in this case. Some of them were cases where the compensation act had removed the defense of contributory negligence and assumed risk. The Supreme Court, in Ill. 315, held that the declaration in this case stated a good cause of action, and that decision is conclusive the pleading as far as this appeal is concerned. If appellants had no duty to furnish, then the declaration did not state a cause of action, and it does follow that if the declaration did constitute a cause

of action that the appellants owed some duty to the deceased.

It has been held that electricity is a silent, deadly and instantaneous force and all persons handling it are bound to know the dangers incident to its use and to guard against acciden by a degree of care commensurate with the dangers incident to its use. Postal Telegraph Company vs. Likes, 225 Ill. 249; Hausler vs. Commonwealth Electric Company, 240 Ill. 201; Stedwell vs. City of Chicago, 297 Ill. 486. The question is whether the appellants guarded against accident to the deceased with that degree of care commensurate with the dangers which surrounded him. There is no dispute but what the deceased received a violent shock of electricity while he was working on this car. There is considerable conflict in the evidence as to the cause of that shock. The contention of the appellants is that he received it because of his own fault in disconnecting the ground wire and then attempting to move the car. On the other hand, the evidence on behalf of the appellee shows that this car had formerly been wired standard general electric type. In that type of wiring there was a ground cable running directly from the controller in one end of the car to the controller in the other end. There was a post on each of the trucks to which a ground wire was connected from the truck to the ground cable. The binding post to which the ground wire was attached was at the top of the motor casing. There was a ground connection from the ground cable to the top of each motor, and the ground wire attached to the cable was fastened to the truck, making two separate and distinct ground wires, one from each motor. The only way these ground wires could be seen or repaired was by taking up a trap door over each motor in the floor of the car. They could not be reached from the pit under the car. The wire that was used to connect the ground cable to the binding post was a No. 2 flexible wire, consisting of a number of strands of fine wire. If both ground wires were removed the car could not be moved unless a short circuit was made, but

of action that the appellants were wrong only to the extent.

It has been held that electricity is a wild, deadly and intractable force and all persons handling it are held to know the dangers inherent in its use and to provide against injury by a degree of care commensurate with the dangers inherent in its use. Postal Telegraph Company vs. Hikes, 220 Ill. 488; Hunter vs. Commonwealth Electric Company, 240 Ill. 203; Stewart vs. City of Chicago, 187 Ill. 474. The practice in complaint the appellants pleaded injury inherent to the connect with that system of 2300 commensurate with the dangers which accompanied it. There is no dispute but what the deceased received a violent shock of electricity while he was working on this car. There is considerable conflict in the evidence as to the cause of that shock. The contention of the appellants is that he received it because at the moment he was climbing the pole the driver was moving to move the car. On the other hand, the evidence on behalf of the appellee shows that this car had formerly been fitted standard general electric type. In that type of wiring there was a ground cable running directly from the controller in one end of the car to the controller in the other end. There was a pipe on each of the trucks to which a ground wire was connected from the truck to the ground cable. The binding post to which the ground wire was attached was at the top of the motor casing. There was a ground connection from the ground cable to the body of each motor, and the ground wire attached to the cable was fastened to the truck, making two separate and distinct ground wires, one from each motor. The only way these ground wires could be seen or repaired was by taking up a trap door over some motor in the floor of the car. They could not be reached from the side under the car. The wire that was used to connect the ground cable to the binding post was a No. 8 flexible wire, consisting of a number of strands of fine wire. If both ground wires were fractured the car could not be run unless a short circuit was made, but

the ground wire from one motor could be removed without removing the ground wire from the other motor.

The armature in this car had blown out prior to the injury causing one of the motors to be what is called a dead motor, and the other motor, to which no damage had been done, was the live motor. The evidence shows that this standard general type of wiring which was formerly on the car had been changed before the accident, and another system, above described, had been substituted. The deceased had been working on the dead motor and had done nothing to the live motor. There was, on the dead motor, a piece of one strand copper wire which, in the absence of other ground wires, acted to ground the current, and when this wire was disconnected below and above the "Y" there was no ground wire from the live motor to protect the operator of the car from a charge of electricity. The deceased had been working in the pit from which the ground wire could not be reached had it been standard general electric type. As it was wired, the live motor had no ground wire, neither motor was equipped with a ground wire in the usual and ordinary way from the ground cable to the binding post on the top of the motor. If both motors had been grounded with a ground wire to the ground cable the deceased would not have been injured. After disconnecting the wires on the dead motor, but without touching the live motor, the deceased attempted to move the car and was shocked. Appellants' claim that the wiring on the car as it existed at that time was the usual and customary way of wiring cars, and that the deceased knew this fact; that it was not necessary to have more than one ground wire or one ground in the system.

The charge in the declaration is that the appellants negligently and carelessly permitted the car to be and remain equipped in a dangerous, defective and improper condition. There is evidence amply tending to show that the manner in which this was was wired at the time of the accident was not proper, and was unsafe.

the ground wire from one motor, well or twenty sixteen feet, connecting the ground wire from the other motor.

The structure in this car had flown out prior to the injury, leaving one of the motors to be what is called a dead motor, and the other motor, to which no damage had been done, the live motor. The evidence shows that this standard general type of wiring which was formerly on the car had been damaged before the accident, and another system, more complicated, had been substituted. The deceased had been working on the dead motor and had been nothing to the live motor. There was, on the dead motor, a piece of one strand copper wire which, in the absence of other ground wires, acted to ground the current, and when this wire was disconnected below and above the "T" there was no ground wire from the live motor to protect the operator of the car from a change of electricity. The deceased had been working in the pit from which the ground wire could not be reached but it been otherwise proper electric type. As it was wired, the live motor had no ground wire, neither motor was equipped with a ground wire in the usual and ordinary way from the ground cable to the bonding work on the top of the motor. If both motors had been provided with a ground wire to the ground cable the deceased would not have been injured. After disconnecting the wires on the dead motor, without bonding the live motor, the deceased attempted to work the air hoist the electrical "equilibrator" which was fastened on the car to it relative of that line on the dead motor, and then the deceased was killed by a shock of electricity, and that the deceased was not working, but it was not necessary to have been the general electric or the system.

The charge in the declaration is that the defendants negligently and carelessly permitted the car to be and remain equipped in a dangerous, defective and improper condition. There is abundance amply tending to show that the manner in which this car was wired at the time of the accident was not proper, and was wrong.

There is a conflict in the evidence on this point. Witnesses testified on both sides of the question. We think, however, the evidence shows that the car was, some time prior to the accident, wired with two ground wires; that the deceased was not familiar with the change which had been made in the wiring of this car and for that reason disconnected all ground wires and received the shock. It was purely a question of fact for the jury to determine from the evidence whether the appellants were guilty of the negligence charged in the declaration, and from a careful examination of the evidence, we cannot say that the jury was not justified in finding that the appellants were guilty of the negligence as charged.

It is admitted that deceased died as the result of a sarcoma, but the question is whether the shock to the deceased caused the sarcoma which resulted in his death. The appellants claim that during the early part of 1914, the deceased had been failing in health and while at work he would often drop his hands, and be short of breath; that his breath was constantly foul and could be smelled several feet away, and it smelled like burnt flesh; that he had for years prior thereto complained of heart trouble and had received a pension on that ground; that in the early spring of 1914 he was told that his daughter was sick in a hospital in Rockford and he said he could not go to her on account of his heart trouble and could not stand it. On the other hand, it is contended by appellee, that prior to the accident, deceased had been in fairly good health; that he had worked seven days a week for two or three years before the accident; that it was not until after the accident that his breath became foul, but that after that it did become foul and smelled like burnt flesh; that after the accident he had difficulty in breathing; that he gradually grew worse until his death.

Dr. F. Robert Zeit was called as a witness for appellee. For

twenty-one years he had been a teacher of pathology as Northwestern University Medical School. He was the attending pathologist at Wesley Hospital, Mercy Hospital, Grant Hospital, Alexian Brothers Hospital, in Chicago, and consulting pathologist for a number of other institutions. He testified that he saw sarcoma every day, and that, in his opinion, it was caused by two elements combining, first, an inherited predisposition towards malignant tumor, and, second, an injury to the tissue; that he had studied electricity and was acquainted with its effect upon the human body; that the effect of electricity upon the tissues was to cause tetanic contraction of the muscles of the arms and chest, and the tissue in the chest, and the reaction, when the currect was taken off, would cause a tearing or injury to the tissues; that any voltage of electricity which was sufficient to shock or jolt a person coming in contact with it through the hands would cause injury to the tissue; that such injury, in connection with a predisposition towards malignant tumor, would cause the tumor to grow. A long, hypothetical question was then put to him by counsel for appellee, and he was asked if he would have an opinion from that question whether there was any connection between the sarcoma found in the deceased and the jolt or shock that he received on the street car, and he answered "yes." He was then asked what that opinion was and he answered; "due to the violent muscular contraction, caused by the electric current passing through the chest, an injury of the tissue took place, which was afterwards followed by a malignant tumor in the mediosternum, which afterwards caused the death." On behalf of the appellants five physicians, three of whom were in the employ of the appellants, testified that it was not possible to tell what caused this sarcoma.

On account of the sharp conflict in the evidence upon this question which was so controlling, we have read the evidence of these experts with considerable care. We are convinced that the

witness for the appellee is one of the leading experts upon t question of sarcoma. His ability and great experience are rec nized and admitted by the other expert witnesses in the case. E had come in contract with it almost every day for many years, ha studied it and taught it, even to some of the other experts in this case. If the jury saw fit to give to his opinion more weigh than they did to the other witnesses on this subject we cannot say they were not justified in so doing from all the facts in evidence. Pease was not quite sixty-nine years old on the day of the accident. He was probably not in the best of health but he was able to work seven days a week and had done so for several years. After he received this shock he worked only a few days. Symptoms of infirmities appeared from the hour of the injury, and he continued to grow worse until he died. After his death a post-mortem revealed that sarcoma was the cause of his death. There was evidence tending to show that this sarcoma was the result of this injury. What is the proximate cause of an injury is ordinarily a question of fact for a jury, to be determined from a consideration of all the attending facts and circumstances. It only becomes a question of law, when the facts are not only not in dispute, but are such that there can be no difference in the judgment of reasonable men in the inference to be drawn therefrom. Schultz v. Ericksson Co. 264 Ill. 156. The employer is liable in case of injury caused by his negligence, even though the injured person is suffering from some predisposition which aggravates and intensifies the injury. Peoria Terminal Company vs. Industrial Board, 279 Ill. 352; Wabash Railroad Company vs. Industrial Commission, 286 Ill. 194; Spring Valley Coal Company vs. Industrial Commission, 289 Ill. 315. We think the findings as to the cause of death are in accordance with the evidence and we do not feel justified in setting aside the verdict of the jury on that point.

Appellants contend that the hypothetical question put to Doctor Zeit, and his answer thereto were improper, because they violate the rule that where there is a conflict in evidence as to whether a person was injured in the manner claimed, it is not competent for witnesses to give their opinion on that subject, and several cases are cited in support of this rule. We do not think the question and answer were improper. The rule with reference to a physician testifying is that where the immediate cause of death is not disputed, it is competent for an expert medical witness to give his opinion as to the cause which resulted in death. Devine vs. Chicago City Railway, 195 Ill. App. 304; Alpe vs. Sup. Coal Company, 208 Ill. App. 67; Kimbrough vs. Chicago City Railway Company, 272 Ill. 71; Squire Dingee Co. vs. Industrial Board, 281 Ill. 359. It is not disputed that the death of the deceased was caused by the sarcoma, and the testimony of the witness was merely the expression of his opinion as to whether that sarcoma was caused by the electric shock which the deceased received. This question and answer were not in violation of the rule. But even if the question and answer were improper, appellants were in no position to complain of the error, for the reason that similar questions were asked and answered by the witnesses who testified on behalf of appellants. In each case the questions covered all of the facts and the experts were asked to express their opinion based upon the facts as stated.

The deposition of the deceased was taken a few days before his death, and at its close he was asked whether there was anything else he ought to state. He answered that the piece of wire that was put on for the ground wire was just a piece of common wire and not put on as it ought to be. Complaint is made of this question but the only objection made to it is that it was immaterial. After the question was answered no motion was made to exclude the answer. The question was proper, the last part of the answer was improper,

but as no motion seems to have been made to exclude the improper part, the appellant cannot complain.

Certain questions were asked Charles Pease, a son of deceased, pertaining to the appearance and acts of his father several days after his injury. He testified that he saw his father sitting in a chair; that he stayed at home about all the afternoon and saw something about his father that day that he had not seen before. The question was asked what it was, and he answered that his face was drawn and he appeared to be suffering a great deal of pain. A motion was made to strike the answer, it was denied and the witness continued that the position he was sitting in made him think he was suffering pain; that he was sitting straddle of a chair with his arms over the back of it. We have examined this part of the evidence and in each instance the question asked was proper, and in each instance a part of the answer was proper, but the motion to strike out the answer covered the entire answer and was not limited to the part which was improper. On account of a proper motion not having been made the court properly refused to strike the entire answer.

Over the objection of appellants, Charles Pease was permitted to testify that a car equipped with two motors was improperly wired where there was no ground wire from the ground cable to the truck; that a car having one live motor and one dead motor was unsafe to move where there was no ground wire from the truck to the ground cable; that in order to ground the currect with a common one strand wire it would have to be connected in Number Two field wire. Complaint is made of the admission of all of this evidence. Before testifying the witness qualified as an expert electrician. He was the man who had originally wired this car, as he testified, according to the standard electric type. Whether this car was properly wired and whether the manner in which it was wired was unsafe were not matters of common knowledge. When the facts upon which opinions are founded cannot be ascertained and made intelligible to the court

and jury, the opinion of expert witnesses may be received. Gunderlach vs. Schott, 192 Ill. 509; Henrietta Coal Company vs. Campbell, 211 Ill. 216; Chicago vs. McNally, 227 Ill. 14; Hamilton vs. Spring Valley Coal Co. 149 Ill. App. 10; Wordorski vs. Illinois Steel Co., 160 Ill. App. 390; Keefe vs. Armour, 171 Ill. App. 573.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-

Clerk of the Appellate Court.

140 - 26798

INDEPENDENT OIL MEN'S ASSOCIATION,
a corporation,
Appellee,

vs.

THE NATIONAL CITY BANK OF CHICAGO,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

225 I.A. 648

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment rendered in favor of the plaintiff in the Circuit Court of Cook County for the sum of $5,435.

In the declaration filed in the cause the plaintiff alleged in substance that the defendant had received from the United States Government $6,000 face value of Liberty bonds for delivery to plaintiff; that it refused to deliver the bonds to plaintiff and converted and disposed of them to its own use.

At the close of all the evidence the trial judge peremptorily instructed the jury to find the issues for the plaintiff, the jury returned a verdict as directed and judgment was entered thereon. The evidence introduced on the trial shows that the plaintiff is an organization of refiners and jobbers of petroleum and that it maintained an office in Chicago of which one J. A. Specht was in charge. The officers of the company were as follows: M. J. Byrne, President; G. I. Sweney, Vice President; J. A. Specht, Secretary and E. A. Grant, Treasurer. Specht alone of the above officers resided in Chicago at the time of the alleged conversion of the bonds. On October 11, 1917, the plaintiff, by resolution authorized Sweney and Byrne to employ a secretary and they "as a committee did employ Specht." Sweney testified that Byrne made a memorandum of the employment agreement

with Specht; that no minute had been kept of the directors meeting which referred to the appointment of Specht, but that he knew that Specht was present when the matter was discussed and explained to the board. This memorandum which Sweney testified was signed by Byrne and Specht was offered in evidence and was excluded. A part of the excluded agreement is as follows:

> "The secretary * * * shall keep collected promptly all moneys due the association from whatever source, and shall during the first week of each month furnish the directors with a 'trial balance' or statement showing the financial condition of the association including, first, cash received during month and from whom, second, cash expenditures, to whom paid; third bills and accounts receivable and bills and accounts payable."

The principal facts in connection with the transaction out of which grew the litigation are not in dispute. There is evidence which shows that Specht had for sometime acted as secretary of plaintiff corporation and that he was in general charge of its business and office in Chicago.

The defendant is a national bank and in the year 1918 it undertook to receive applications and payments for fourth Liberty bonds. In October, 1918, the plaintiff subscribed for $5,000 of fourth Liberty bonds and an initial payment was made by Specht, who, acting for plaintiff, sent plaintiff's check from New York city to Chicago. Plaintiff's subscription and first payment on the bonds were received by defendant October 21, 1918, and it delivered to plaintiff a subscription receipt upon which it noted the initial payment. Thereafter other installments were paid on the bonds by a woman in plaintiff's employ. January 31, 1919, Specht delivered to defendant bank plaintiff's check signed by Grant, plaintiff's treasurer, for a final payment on the bonds. Specht surrendered the subscription receipt card and defendant turned over the bonds to him and he delivered to it a receipt as follows:

> "Received of The National City Bank of Chicago

$5,000 face value United States Government Fourth Liberty Loan Bonds in fulfillment of subscription.

Date Jan. 31, 1919.

(Signature) Independent Oil Men's Assn.,
J. A. Specht, Secy."

February 24, 1919, Specht absconded with money and securities, the property of plaintiff, among which was the bonds in question. April 11, 1919, the plaintiff, through its treasurer, Grant, made a demand upon defendant for a delivery of the bonds to him. Delivery was not made and plaintiff brought suit for a conversion of what it says is its property.

E. E. Grant, plaintiff's treasurer, alone had authority to sign checks against an account which plaintiff kept in the defendant bank. Arrangements for the opening of this account were made by Specht. Grant, the treasurer, was not a member of plaintiff's board of directors and he spent but little time at its office. He testified that he had probably spent three days a month in plaintiff's Chicago office during the period that Specht was in charge.

The assistant manager of defendant's bond department testified that Grant had informed him that he, Grant, in order to carry on plaintiff's business in Chicago had found it expedient to leave signed blank checks for the use of Specht. Specht, acting for plaintiff, had been a party to the original subscription for the bonds; he made the first and final payments due thereon; he was employed to conduct plaintiff's business by Byrne and Sweney, who had been delegated by defendant's board of directors to make the contract under which Specht had agreed to devote all of his energy and best efforts in the line of his duty as plaintiff's secretary. The agreement provided that he was to endeavor to build up plaintiff's membership and "keep collected promptly all monies due the association from whatever source" and to "furnish the directors with trial balances or statements showing the financial condition

of the association, including cash received during the month and from whom, cash expenditures, to whom paid; bills and accounts receivable and payable; also to reside in Chicago or one of its suburbs and be at the office during business hours except when necessarily absent therefrom in the line of duty."

It is our opinion that the instrument excluded from the evidence and from which the above quotations are taken should have been admitted, even though it appears that it was not signed by Sweney, who was delegated with Berns to enter into the contract. This instrument was produced from the files of the plaintiff company.

This is not, as we read the record, a case where, as seems to be the position taken by the plaintiff, the question of the agent's implied authority is in issue.

In Jackson Frear Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 181, the Supreme Court held that where one seeks to take advantage of the act of an agent, it is for him to show the authority of the agent. As we view the record before us, the defendant sought by tender of the contract in question to show that actual authority was vested in Specht to receive the property on behalf of the plaintiff. The instrument, if admitted, would have tended to prove that Specht had actual authority to collect and receive all monies due plaintiff from whatever source, and it is our opinion that under this contract, when taken in connection with the other evidence introduced in the case which tended to show Specht's general authority to transact business for plaintiff, the court should have submitted the case to the jury.

We are inclinded to agree with the contention that taken singly no one of the several facts shown by the evidence was sufficient to charge the plaintiff with responsibility for Specht's action. However, when due consideration is given to his undoubted authority to transact business generally on

behalf of plaintiff; that Grant, in order to enable the latter to transact business on behalf of plaintiff had entrusted him with signed blank checks; that Specht was authorized under his employment contract to collect all monies due the plaintiff and, in fact, had transacted its business generally with the defendant bank and had possession of the subscription receipts, sufficient evidence was submitted for plaintiff to authorize the trial judge in submitting the question of Specht's actual authority to receipt for the bonds to the jury. These facts taken together with the excluded instrument furnish some evidence of actual authority vested in Specht to receive the bonds.

Plaintiff made no complaint of Specht's alleged unauthorized conduct for at least six weeks after Specht had absconded with the bonds and other property belonging to plaintiff. He was not by any means a stranger to the plaintiff, and if it can be held that he in fact exceeded his actual authority, then, we think, the law imposed upon the plaintiff the duty of promptly repudiating his action. If Specht had actual authority to receive the bonds then the defendant was not guilty of negligence in turning them over to him. We do not think that plaintiff was called upon to repudiate Specht's conduct simply because he had assumed to sign a receipt for the bonds on behalf of plaintiff. The fact seems to be that Specht was plaintiff's secretary and that he had wide general powers to transact its business in Chicago, and if in the exercise of those powers, which were known to the defendant, and while assuming to act for his principal, he overstepped his authority, then the plaintiff would be required to repudiate his conduct as soon as it became aware of it. The case is not similar to the case of Sizard Oil Company v. U. S. Express Co., 265 Ill. 156, where the controversy concerned unauthorized conduct on the part of defendant and one Walsh, in which case the court said:

"The question was whether the person who made the endorsements had apparent authority to make them as agent of the plaintiff, and it was held that if the course of dealing between the agent and third persons was such as to justify them in believing that he possessed the requisite authority the plaintiff would be estopped from disputing it."

In the case of Ward v. Williams, 26 Ill. 447, the Supreme Court said:

"In general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has thus been done in his name by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification."

If it can be said that Specht had no authority whatsoever to receipt for the bonds on behalf of the plaintiff, then his act in so doing constituted a forgery.

In Findlay v. Corn Exchange National Bank, 166 Ill. App. 57, it was held:

"The authorities are all agreed that in a case of this kind it is the duty of the depositor to notify the bank immediately upon his discovery of the forgery. There is some controversy in the authorities as to what results shall follow the breach by the depositor of his duty in this respect. We think the trend of Illinois cases is that the depositor who fails to notify his bank of the forgeries as soon as they are discovered loses all right of action against the bank."

The Circuit Court erred in peremptorily instructing the jury to find for the defendant and in excluding the instrument above referred to.

The judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

McBurney and Matchett, JJ., concur.

137 - 25016

FRANK R. MONTGOMERY,
Appellee,

vs.

ROBERT BURGESS and CHARLES W. BURGESS, Doing Business under the Firm Name and Style of ROBERT BURGESS & SON,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court of Chicago against defendants for the sum of $2054.82, which the defendants seek to reverse by appeal to this court.

Suit was originally brought against the defendants doing business under a firm name, and also against Robert Burgess, one of the defendants, individually. On the trial, at the close of plaintiff's case, the court on motion of counsel for defendants dismissed the suit as to Robert Burgess individually.

A point is made that the order dismissing the suit as to Burgess was not correctly made or entered. We do not think, however, that there is merit in the point. A statement of claim filed alleges that plaintiff delivered a horse named "Judge" to defendants for sale; that defendants sold the horse to one L. H. White and received therefor the sum of $2250; that the defendants, though often requested, had failed to pay the amount received for the horse to plaintiff. In an affidavit of merits the defendants alleged that they had received for the horse in question a note for the sum of $1,000, which they had discounted at an expense of $80; that plaintiff was indebted to defendants for veterinary services, feed for and maintenance of the horse in the sum of

$323.60, and also that plaintiff had directed defendants to invest any balance due him in other horses.

The case was tried before the court and a jury. The evidence introduced on behalf of the plaintiff tended to show that both parties to the litigation were engaged in the business of breeding horses; that in 1911 one of the defendants had said to plaintiff that he would like to show plaintiff's horse in company with four horses owned by defendants at a stock show to be held in Chicago. Plaintiff testified that he reluctantly agreed to permit his horse to be shown as requested; that he did so under an agreement with the defendants that they would sell the horse for him "without cost." Plaintiff's testimony is that one of the defendants "was to show him free of cost to me and get all I won with him." Plaintiff shipped the horse to defendants and it was exhibited at the International show, where it won a prize. Defendants thereafter sold it to one White, and the plaintiff testified that defendants had failed to report the sale to him and had never paid him anything for the horse; that he became apprised of the sale by reading a notice in "Breeder's Gazette."

Defendant Robert Burgess, called under Section 53 of the Municipal Court act, testified that at the time he made the arrangement with plaintiff he was acting for the partnership of Robert Burgess & Son. Robert Burgess in testifying admitted that he sold plaintiff's horse to L. H. White in February, 1912, and that he received a note therefor for the sum of $1000.

The principal controverted question of fact in the case, however, centers about the disposition by defendants of a horse named "Iblis." Robert Burgess testified that he imported the latter horse from France and had sold him in November, 1910, to one Hunen for $1500. L. H. White testified that he purchased

the horse "Judge" from defendants; that before that time he had purchased the horse "Iblis" from them for $1050; that some time later he discovered that the latter horse was unsound and he returned it to defendants, one of whom promised witness that he would loan him a horse until "they could get one to suit us, of equal value;" that some time after the return of "Iblis" he, White, had accepted plaintiff's horse "Judge" in exchange for "Iblis;" that at this time the defendant Charles Burgess said he would let the witness have the horse "Judge" for the horse which witness had returned to defendants and the witness' note for $1000. The witness testified very definitely that he had paid defendants $1050 for "Iblis;" that he had exchanged him for the horse "Judge" and in addition had given for the latter the witness' note for $1000; that the fair cash market value of "Judge" at the time was $2000.

The testimony of the defendants contradicts that of White and plaintiff in important particulars. Their testimony is to the effect that in the first instance "Iblis" was sold to Hanen, that the latter was White's employer, and that the purchase price paid by Hanen for the horse was $1200.

Defendants' evidence was that "Judge" was sold to White for the $1000 note, and that this transaction did not include the defendants' or White's dealings with the horse "Iblis;" that after "Iblis" had been sold to Hanen the latter had shipped him back to defendants' barns. White testified that when "Iblis" was returned to defendants' barn he, the witness, had examined horses in defendants' possession, and finding none the equal of "Iblis" had agreed with defendants that they were later to give him a horse equalling the value of "Iblis." White testified that some months after the return of "Iblis" he entered into the deal with defendants for the sale to him, White, of plaintiff's horse.

The evidence is in direct conflict on the controverted questions of fact in the case. The trial Judge and jury were in a much more favorable position to pass upon these questions than are we. It is impossible to reconcile testimony so conflicting, and we are therefore unable to say that the verdict of the jury is against the weight of the evidence. This is true not only of the evidence touching the nature of transactions in issue, but also with reference to the value of the horses in question.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McCarely and Hatchett, JJ., concur.

184 - 26844

FRANK V. SKULOVE,
Appellant,

vs.

LOGAN D. WALLACE, JR.,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

225 I.A. 648[3]

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in the Superior court of Cook county against defendant to recover for personal injuries sustained in a collision between an automobile and a motorcycle.

The declaration, which consisted of one count, charged that the plaintiff, a motorcycle policeman, while in the act of pursuing a speeding automobile was injured through the negligence of the defendant. At the close of plaintiff's case the jury which heard the evidence, in compliance with an instruction of the court found the defendant not guilty. A judgment was entered upon this verdict and plaintiff appeals.

Evidence introduced by plaintiff tends to show that August 11, 1918, plaintiff, a motorcycle policeman employed by the Village of Riverside, was injured while pursuing a speeding automobile moving on Desplaines avenue in said village; that the automobile was moving, in violation of the law, at the rate of 31 miles an hour for a distance of about two-tenths of a mile. Plaintiff testified that he was traveling north at the time he followed and passed the speeding car; that as he caught up with defendant's automobile he, plaintiff, cut his speed down to about 25 miles an hour; that he had passed two automobiles and later had caught up with defendant's car, which was also proceeding north; that as plaintiff was about to pass this third car and after the

front wheel of the motorcycle had passed the hub cap of its rear wheel, defendant, without giving any signal or warning of his intention so to do, suddenly swung to the west and plaintiff's motorcycle collided with the automobile.

Plaintiff further testified that he had sounded an electric horn on his motorcycle when he was about to pass defendant's car; that no street intersected Desplaines avenue at the place of the accident; that defendant had looked back and "when I was about to pass his car ~~and~~ he turned west. He was going north, looked back, and when he looked back it seemed that he turned his whole body and swung his car to the left, turning toward his left." Plaintiff testified also that he was going about 12 miles an hour when the collision occurred.

We think there was sufficient evidence to warrant the submission of the issues of fact raised by the pleadings to the jury.

There was not such variance between the allegations of the declaration and the proof as would warrant taking the case from the jury. The declaration charged that the defendant so carelessly and negligently drove the automobile that it struck and collided against plaintiff's motorcycle. We think under this allegation the jury, if it believed plaintiff's testimony, could conclude that the accident was the result of a collision between the motorcycle and the automobile and that each had struck against the other. The general rule is as stated by counsel for defendant. Mahash Venizian Ex. Co. v. Friedman, 140 Ill., 666. But we do not think it applicable to the facts as testified to by plaintiff. The testimony of plaintiff and other witnesses is to the effect that just before the accident happened the plaintiff was driving on the west side of a north and south street; that in compliance with the law he had attempted to pass to the left of a moving automobile, when the latter, without

warning to plaintiff, turned to the left and the vehicles collided. On this testimony the case should have been submitted to the jury.

The judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

Mathews and Hatchett, JJ., concur.

246 - 28906

225 I.A. 648

HENRY STULIK,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
CHICAGO CITY RAILWAY COMPANY,
CALUMET & SOUTH CHICAGO RAILWAY
COMPANY, and the SOUTHERN STREET
RAILWAY, Operating Under the Name
and Style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Henry Stulik, plaintiff, at about eight o'clock Sunday evening, February 14, 1915, was riding in a southerly direction on South Paulina street, a north and south street, in an automobile owned by him. Plaintiff at the time sat in the rear seat of the automobile; his nephew, the driver of the car, sat in the front seat on the left side, and the latter's brother George Stulik sat at his right. As the automobile was driven across 14th street, an east and west street, in the city of Chicago, it was struck by an east-bound street car running on the south one of two street railway tracks laid down in 14th street and thereby plaintiff sustained injuries for which he brought suit against defendants. A jury returned a verdict for the sum of $12,000 in favor of the plaintiff. Judgment was entered on the verdict, which defendants seek to reverse.

A principal contention on behalf of defendants is that recovery is barred by contributory negligence; that the evidence fairly establishes one of two propositions - first, that plaintiff or his driver did not look before crossing the track; or, second, that plaintiff or his driver did look and saw the street car coming closely at hand, and had deliberately assumed the risk of

crossing the tracks.

As the case is to go back to the trial court for a new trial, we do not mean to intimate that the evidence establishes any fact in issue between the parties, or shows that plaintiff or the driver of the automobile were free from contributory negligence. It is our opinion that the question of contributory negligence under the evidence introduced was properly submitted to the jury by the trial Judge. It seems to be conceded that the driver of the automobile was at the time of the accident in the employ of plaintiff, and that the negligence of the driver, if any, must be imputed to plaintiff.

Henry B. Stulik, the driver of the automobile, died some time before the case was tried.

Plaintiff testified that on the evening in question he was riding in his automobile and that his nephew Henry was driving; that he did not remember approaching 14th street and that he had no recollection of what happened just before or at the time the accident occurred.

Plaintiff's nephew George Stulik, who sat in the right front seat of the automobile, testified that his deceased brother was a licensed chauffeur; that just before the accident happened the automobile in which the witness was riding approached 14th street at a speed of from 10 to 12 miles an hour; that when it was 15 or 20 feet north of the north building line on 14th street the driver tooted his horn, pushed out the clutch and put on the brakes to slacken speed; that the machine slowed down to a speed of about four or five miles an hour; that the driver looked east and west, and that he, the witness, did the same thing; that "when I looked to the west I did not see any cars or vehicles approaching. The driver then released the brake, put in the clutch and started across. It gradually increased in speed so that we were going six

dynamical fire issues.

As the case is to be back in the trial court, it is hardly fair,we do not seem to believe that the evidence submitted may find in favor because the question, is there that plaintiff is the driver of the motorbike when the two accidents occurred. It is the opinion that the question or conditioning sufficient to enable the defendants to properly submit to the jury of the trial judge. It seems to be conceded that the driver of the motorcycle was at the time of the accident in the employ of plaintiff, and that the relationship is the crucial, it may not be important to plaintiff.

Among 3, finally, the driver of the motorcycle, did not give clear signal the trial judge.

PLAINTIFF'S EVIDENCE TEND TO THE EFFECT: A CONSTABLE OF THE VILLAGE OF THE MOTORCYCLE WAS THAT THE DRIVER THERE WAS EVIDENCE THAT HE DID NOT PROPERLY SIGNAL WHEN HE TURNED TO THE RIGHT OR TURNING AT THE SAME POINT PRIOR TO THE TIME THE MOTOR VEHICLE.

"PLAINTIFF'S MOTOR VEHICLE ACCIDENT, THE ONE IS THE FIRST EVENT WHEN IT THE MOTORCYCLE, TESTIFIED THAT THE SECOND TRAILER WAS A TRAINED MOTORCYCLE THAT JUST BEFORE THE MOTORCYCLE TURNING HAD SUCCEEDED IN MAKING THE DRIVER THE RIGHT SIGNALING WITH ALMOST AS A SPEED OF TWO IN IT WITH AN EVENT THAT WHEN IT WAS AT THE TIME OF THE TURN BEFORE THE MOTORCYCLE, THE CAR IN THE FIRST EVENT BEFORE TURNED THE RIGHT, WHEREAS THE THE DRIVER HAD NOT SIGNAL THE TURNING IT WITHOUT SPEED; THAT THE MOTORCYCLE WHEREAS THE CAR IS A SPEED OF ABOUT TWO OR TWO MILES AN HOUR; THAT THE DRIVER SAWSAW THE CAR AWAY, AND THAT BY THE TIME, HE THE WAS CLOSE THE TURN. I BELIEVE IN THE WAY I AM NOT AND ANY TURN OF VEHICLE DRIVERS. THE DRIVER THE WITNESSES THE TURN, THAT IT THE DRIVER NOT SIGNAL WITNESS. IT SPECIFICALLY DEMONSTRATE IN WHAT HE TURN IT THE WAY AWAY HIS

to eight miles an hour as we crossed the street car tracks. The front end of the automobile was about six feet north of the street car tracks when he released the brake and put in the clutch;" that from that time until he got onto the tracks "he looked east and west;" that he, witness, looked ahead, but did not see any street car approaching from the west just before the automobile started across the south tracks on Paulina street; that there were some people on the street, but no vehicles; that as the automobile was crossing the tracks he did not hear a gong sounded on the street car; that the automobile was struck at the hub of the rear wheel on the right side by an east-bound street car and it was "thrown through a 90 degree angle; it was now facing north about 75 feet from where it was struck;" that after the collision the street car ran a distance of about 300 feet past Paulina street; that at the time of the accident the street was dry; that the automobile did not change its course up to the time of the collision; that it continued in a straight line south, "so our right wheels were at all times about six feet from the curb;" that it was a clear evening and there was nothing to obstruct his, witness', view.

An elevated railway structure was located about 120 feet west of the west line of Paulina street. George Stulik testified that just before the collision he saw a train passing on the structure; that he for a third time looked westward along the east-bound track and saw the glaring light of a street car for the first time when it was four or five feet away; that at this time the automobile was going about eight miles an hour; that he heard the rumbling of the elevated train when he passed 14th street, but that he did not hear the approaching street car.

A store and residence building was located on the northwest corner of 14th and North Paulina streets, but it was not so situated as to obstruct the line of vision of the persons

So night falls on Dover as we arrived our first day there. The front row of the automobile was above the dark waves of the storm and trembles then be pressed the throat and yet in the distance" that time that that would be yet into the tremble "the lighted boat and away!" that be, without, taking around, not it but you say street our approaching from the week just before the automobile stopped across the stark tremble on further already that there were some people on the street, and as realizing that on the automobile was attempting the hours to it! you have a gray inverted on the street said that the automobile was through at the top of the year would on the right side by an unnoticed slowly the and it our "Strange harbour a bi degree moist; it was our during words about it that then where it our already" also after the mobilizes the street our was a fixture of about the that great motion street; that at the time of the instant the street our day that i - but mobile the not always its across up to the time of the mobilizes that it mentioned in a strange time week, "So our right shade were of all time about all from the today" that it our a right were day our there now nothing to another rain, street", time.

An strange making pressure our tender about the that were of the real time of trolley street. Across trolls lamplit just before the mobilizes to see a high passing on the streets; that on for a light time bound vehicles along the east-bound lamps and the glaring light of a street on the time time when it was then to the first week; that at this time the automobile was grey about right after an hour, that in front the vanishing of the circular lamp when be passed last night, but that be its and then the appreciably slowly was.

A where and residence building was towards on the northern corner of 34th and Lexington Avenue, but it was not so difficult as it thatment the time of trolley of the passing

in the automobile in such manner as to prevent them from seeing the approaching east-bound car.

David Rose, a witness for plaintiff, testified that at and before the time of the accident he was riding upon the front platform of the east-bound street car; that some blocks west of Paulina street the motorman had been engaged in talking over "war matters" with a man who got off the car at Robey street; that the motorman at this time seemed somewhat excited; that after the street car had reached a point eight or ten feet east of the Metropolitan elevated railway structure the witness drew the motorman's attention to the automobile, which was south-bound on Paulina street; that at this time the automobile was "coming out" of Paulina street onto 14th street; that the witness said to the motorman, "Here is the machine coming out of Paulina street;" that he, the witness, had noted that just before the accident "the handle which he" (the motorman) "uses, controls the motor with, was right close up against to this here stop, and I knew when I see that, I knew that is the time they have full speed on the car." This witness testified that the car stopped after the accident more than half a block east of Paulina street, and that the automobile was found forty or fifty feet away from the point of collision. Upon cross-examination he stated that he was somewhat excited at the time of and just before the accident. It is urged with some reason, that the testimony of this witness was materially weakened on cross-examination. He testified that he did not note that the automobile slackenedup just before it attempted to cross the east-bound tracks and that he had "no idea how fast the street car or automobile were going;" that the headlights of the street car were burning.

One Lipenski, a driver of a coal truck, testifying for defendants, stated that he was on the southwest corner of the

intersection at the time of and just before the accident; that he first saw the automobile when it was about 150 feet north of the north line of 14th street; that at this time the front end of the east-bound street car was 50 feet from the west side of Paulina street; that from this time he watched both vehicles until the accident occurred; that the automobile as it entered 14th street was going about twenty-five to thirty miles an hour, and the street car was moving about eight to twelve miles an hour; that the automobile did not change its speed before the accident occurred; that it had turned to the left toward the east; that the motorman was ringing the bell on the car; that the motorman shut off the power and that he, the witness, could hear the brakes and see smoke coming from under the brakes; that the street car was lighted in the usual manner, headlight burning and inside lights burning; that after the accident the street car stopped on the east side of Paulina street with its front end at the east building line, "so that it left the back end of the car blocking up Paulina street;" that he helped a man out of the automobile and brought him to the drug store on the northeast corner of the street; that in doing so he passed in front of the east end of the street car; that when he came out of the drug store he noticed the car had been moved about a length and that the back end then cleared the east walk; that the street car was never down in the middle of the block. On cross-examination he stated that two headlights were burning on the automobile.

One Small, a police officer, a witness for defendant, testified that he arrived near the scene of the accident after it occurred and when plaintiff was in the drug store; when he, the witness, left the drug store, he found that the street car was to the east side of Paulina street; that "the rear end of the car wasn't what you would call clear across the sidewalk." LeFebre, a police officer, testifying for defendants, corroborated the testimony

of Small.

Peter J. Keen, the motorman on the street car in question, testified that the accident occurred between eight and nine o'clock in the evening; that his car was moving at the rate of about 15 miles an hour when at a distance of about 75 feet west of the west crosswalk "I released my power and coasted up to the west crosswalk; sounded my gong. Got onto the middle of the west crosswalk and I noticed an automobile at the north crosswalk, about the building line. I was about 3 or 5 feet east of the west crosswalk, when the automobile kept on coming, and about the middle of the driveway between the curb and west-bound track is curved and then the automobile swung east in front of me and about the middle of Pauline was when I hit him. My car went on about 25 or 30 feet, even with the east building line, at which I stopped, leaving the automobile on the southeast corner facing north. ---- Before the conductor came back I moved the car to clear the traffic line. After I pulled up the first time I stopped the back end of my car just east of the crosswalk. I was in that position when the conductor came back." This witness further testified that when he first saw the automobile at the north crosswalk the street car was moving at the rate of 10 miles an hour and the speed of the automobile was 30 to 35 miles an hour; that "I turned in my air and threw off my power and rang the gong twice. I had a slippery rail that night." He denied the testimony of Rose that he had discussed the war that evening with a passenger or that any one had informed him of the approach of the automobile, and he stated that the speed of the automobile did not change from the time the witness first saw it until it was struck.

Frank Tyschsper for defendant testified that he was the conductor on the street car in question; that before the ac-

sident the car had stopped at Wood street, a north and south street, next west of Pauline street; that his attention was attracted at Pauline street by the sound of a gong and the breaking of glass; that the speed of the street car at the time was 10 or 12 miles an hour; that at this time the front end of the street car was about in the middle part of Pauline street; that the car stopped with its front end even with the property line on the east side of Pauline street and the back end was in the middle of the street; that he went to the drug store with the injured man and that when he came out the street car had been moved about a car length.

Oswald Kaufmann, testifying for defendant, stated that he was a passenger on the street car at the time of the accident and was riding on the front platform to the left of the motorman; that he did not hear anybody warn the motorman or call his attention to anything; that his attention was first attracted to the impending accident by the clanging of the bell, the shutting off of the power, and putting on the brakes; that at this time the front end of the car was about at the west crosswalk close to the Pauline street driveway; that the witness saw an automobile coming onto the west-bound track on 14th street and that at this time the front end of the automobile was probably five feet north of the west-bound track; that the street car was then going about 12 miles an hour and the automobile seemed to be going faster; that it swerved to the left "and cut onto the middle of our track about the middle of the street;" that the street car struck the automobile at the rear end, and that at the time the street car stopped its front end was about at the east building line of Pauline street; that after the accident the automobile stood at the southeast corner of the streets and was headed about northeast; that persons taking the injured man to a drug store located on

the northeast corner of the streets passed in front of the east end of the street car; that after the accident the street car pulled up a car length and cleared the sidewalk.

It is earnestly contended that the driver of the automobile was guilty of contributory negligence just before and at the time of the accident, and this argument finds much support in the evidence. Three witnesses to the accident gave testimony for defendants which, if believed by the jury, would prevent a recovery in the case. The testimony of these witnesses, if true, indicates that, whatever may be said as to the conduct of the motorman, the driver of the automobile was guilty of negligence which proximately contributed to cause the accident in question. However, the evidence of these three witnesses is in the main contradicted by George Stulik and David Rose, who testified for the plaintiff. The automobile just after the accident stood some distance south of the east-bound tracks and was headed in a direction almost directly opposite to that in which it had been moving before the accident. This fact is some evidence that the street car struck the automobile with much force. The evidence shows that the glass in the front end of the street car was broken and that the motorman had sustained some injuries. George Stulik and David Rose both say that the street car after the accident stopped in the middle of the block east of the intersection. Their testimony in this particular, however, is contradicted by defendant's witnesses, including the two police officers who came to the scene of the accident after it had occurred.

Notwithstanding the fact that the theory of defendants as to the cause and circumstances attending the accident finds strong support in the evidence, it is our view that the question of plaintiff's contributory negligence or that of his driver, were questions which were properly submitted to the jury.

In Schlauder v. Chicago & Southern Traction Co., 253 Ill., 154, the court said:

> "There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. Chicago, Burlington & Quincy Railroad Co. v. Gunderson, 174 Ill., 493; Chicago City Railway Company v. Tomlinson, 199 id. 9.) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances."

The evidence tends to prove that the driver of the automobile had an unobstructed view of the south tracks on 14th street toward the west. There is some evidence that he slackened the speed of his automobile a short distance north of these tracks and that he looked along the tracks toward the west before he attempted to cross. There is evidence of a passing train on the elevated railway structure located 120 feet west of Paulina street, and also that the motorman was warned of the approaching automobile when the street car was a short distance east of the elevated structure. Whether the driver of the automobile did in fact observe the approaching street car and whether, under the circumstances which actually existed, he had reasonable grounds to believe that there was time for him to pass over the east-bound tracks in safety, were questions of fact which the jury, who heard and saw the witnesses, were in a much better position to determine than are we.

There is testimony in the record which tends to prove that at and just before the time of the accident the street car was running at full speed, and this testimony is supported by the effect of the impact upon the automobile. The automobile was a large six-cylinder vehicle, and it was struck with such force and in such manner that immediately after the accident it stood at the southeast of the intersection, headed north. Two witnesses

say that after the accident the street car ran a distance of about one-half block.

In the case of Libby, McNeill & Libby v. Cook, 222 Ill. 206, the Supreme court laid down the rule that where in the record there is any evidence from which, if it stood alone, the jury could, without acting unreasonably, find that the material averments of the declaration have been proven, the case should go to the jury.

In Chicago & Joliet R. R. Co. v. Wenig, 230 Ill. 533, the court said:

> "Appellant further insists that under the proof in this case, the negligence of appellee in failing to look and listen is a question of law, citing Thompson on Negligence, and other authorities. This court in Chicago & Northwestern Railroad Co. v. Hanson, 166 Ill. 483, stated that while it had been formerly held in this state that this was a matter of law, it has since been repeatedly held that it cannot be said as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances, excusing him from doing so. The traveler may not be in fault in failing to look or listen if misled without his fault, or the view may be obstructed by objects or by darkness, and other and louder noises may interfere with his hearing. It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact."

In the case of C. B. & Q. R. R. v. Pollock, 195 Ill. 161, the Supreme court said:

> "What is required of one approaching a railroad track depends upon the circumstances of each case. Courts are not at liberty to say, as a matter of law, that one must conduct himself in a particular manner and observe a certain line of conduct in each case and under all conditions. Negligence does not become a question of law, alone, unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so. Human conduct must be judged by human standards. It may appear to us, on first view, that a man placed in a perilous condition should do a certain thing, and yet, when we have heard all the facts and circumstances, we may well reach the conclusion that in doing the entirely opposite thing he was exercising the highest care of which the circumstances would admit. Whatever may have been the rule in this State in former years, this question is no longer an open one."

The evidence in the record before us, introduced on behalf of plaintiff, if it stood alone and uncontradicted would be sufficient to authorize a verdict in his favor, and although, as stated, this evidence is contradicted by a number of witnesses who testified for the defendants, we do not feel warranted in holding, as a matter of fact or law, that the jury which tried the case could not have found plaintiff or his driver free from contributory negligence.

The trial Judge refused to give to the jury the following instruction tendered by defendants:

> "2. The court instructs you that if you believe from the evidence, under the instructions of the court that before the automobile was driven across or upon the street car track on the occasion in question, either the plaintiff or the driver of the automobile saw the street car approaching, and knew that said car was coming at such a rate of speed that the automobile could not cross said track without being struck by said car, unless said car should be stopped or slackened in speed, and that with such knowledge - if you find that either the plaintiff or his driver had such knowledge - either the plaintiff or his driver deliberately took the chances of crossing said track in safety, then the plaintiff cannot recover in this case and your verdict should be in favor of the defendants."

The instruction announces a correct principle of law. Chicago Union Traction Co. v. Jacobson, 217 Ill., 434. The particular purpose in giving the instruction was to inform the jury that if the plaintiff or his driver actually saw the approaching street car and knew that it was running at such rate of speed that the automobile could not with safety pass in front of it, and that the plaintiff's driver nevertheless deliberately took the chances of crossing, such conduct amounted to negligence. The instruction is predicated upon actual knowledge of the driver or plaintiff of the approach of the street car.

The principle announced is not contained in given instructions. Instruction number 10 deals in the main with the duty of the driver of a vehicle about to cross a street car track

to look and ascertain whether a street car is approaching.

Instruction number 13 told the jury that plaintiff could not recover "for the failure to ring the bell or gong" if the plaintiff or his driver saw the defendants' car approaching in time to avoid the accident.

Instruction number 15 told the jury in general terms that the plaintiff could not recover if he or his driver were guilty of negligence which proximately contributed to cause the injuries to plaintiff.

Instructions numbers 16 and 17 are both general in their terms and are sometimes described as stock instructions. Instruction number 16 told the jury that if plaintiff or his driver by the exercise of reasonable care could have avoided the injury to plaintiff, the plaintiff could not recover. Instruction number 17 recites that it was as much the duty of the servants in charge of the car to avoid colliding with plaintiff's automobile as it was the duty of plaintiff's driver to look for and to avoid colliding with the street car.

It is our opinion, also, that instruction number 1 tendered by defendants should have been given. This instruction in substance told the jury that if the evidence showed that the automobile in question was being operated at a rate of speed greater than was reasonable, having regard to the traffic and use of the way, etc., and that such rate of speed proximately contributed in any degree to bring about the injuries, to plaintiff, then plaintiff could not recover. The instruction in its first paragraph correctly stated the statutory law of the State of Illinois, and when properly read did not make proof of the unreasonable rate of speed conclusive evidence as against plaintiff. It merely informed the jury that they were to find defendants not guilty if they believed from the evidence that a violation of

the law had proximately contributed to cause the injury.

Complaint is made of the giving or refusing to give other instructions, as to which we express no opinion. These questions may not arise upon another trial.

For the error of the court in refusing to give certain instructions tendered on behalf of defendants, the judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

Matchett, J., concurs.

McBurnely, J., concurring in part. I am of the opinion that the negligent driving of the automobile contributed to the accident, and that the judgment should be reversed with a finding of facts.

366 - 24877

H. NAGY & SON,
a Corporation,
Appellee,

vs.

FRED REPPERT,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

225 I.A. 649

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered against him in the Circuit court of Cook County for the sum of $961.31.

An action of assumpsit was brought by plaintiff for the value of material furnished and services rendered in making certain repairs and improvements on real estate owned by defendant. As a defense to the action the defendant pleaded the general issue and also filed a special plea, which set up that plaintiff had accepted defendant's check for $830.37 in full settlement and satisfaction of the amount alleged to be due plaintiff. In a replication to defendant's special plea the plaintiff averred that of the $830.37 received from defendant by plaintiff, $799.19 was in full payment of a liquidated balance due under another and a different contract from that mentioned in the declaration, and that $31.18 was credited to defendant; that at the time plaintiff received the said $830.37 no bona fide dispute existed between the parties as to how much was due the plaintiff. A general and special demurrer filed by defendant to the replication was over-ruled and issue was joined on the allegations of the replication.

The evidence tends to show that the defendant had agreed under a written contract to pay plaintiff the sum of $3716.19 for the doing of the work provided for in the contract;

plaintiff against defendant "as extras." Defendant was represented by one Wanless, who consulted with plaintiff and gave directions as to the work and had also examined bills presented by plaintiff. During the progress of the work several objections were made by Wanless to the work; he had disputed the extras and had taken exception to certain charges in the bills presented by plaintiff.

The work provided for in the contract was completed in May, 1918, and for some time thereafter the parties to the suit were unable to agree upon the balance due. There is some contradiction in the evidence, but we think it fairly appears that between the time of the conclusion of the work and July 29, 1918, the parties were unable to agree upon this balance. On the latter date Wanless delivered to plaintiff defendant's check for $820.37 and took a receipt therefor. The check recited upon its face that it was given "in full of a/c to date," and the receipt which was delivered by plaintiff at the time it received the check is as follows:

> "Chicago, Ill., July 29th, 1918.
> Received of Fred Espert the sum of Eight Hundred twenty Dollars thirty-seven cents ($820.37), which is in full payment of all demands to date, and particularly for the work done and labor furnished in connection with the building operations at the Klufer property at Kankakee, Ill., partly covered by contract and otherwise, and in giving this receipt in full it is understood that there are no unpaid bills outstanding for material or labor which will in any way cause or may be the means of any mechanic's liens upon said building or property and such is hereby certified to by me.
>
> Paid
>
> M. Barry & Son
> Per J. E. Barry."

The evidence in the case is voluminous and it is in some particulars contradictory; but it is our opinion that it shows that an actual and bona fide dispute existed between the parties. The record does not present a case where it can be said that the things in dispute related solely to matters of computation. Nor does the evidence show that plaintiff's claim was for a certain

plaintiff against defendant "as owing." Defendant was represented by one Manlaes, who commended with plaintiff and gave directions as to the work and had also examined bills presented by plaintiff. During the progress of the work several objections were made by Manlaes to the work; he had disputed the sections and had taken exception to certain charges in the bills presented by plaintiff.

The work provided for in the contract was completed in July, 1919, and for some time thereafter the parties (i.e. the men) were unable to agree upon the balance due. There is some contradiction in the evidence, but we think it fairly appears that between the time of the completion of the work and July 24, 1920, the parties were unable to agree upon the balance. On the latter date Manlaes delivered to plaintiff defendant's check for $300.37 and took a receipt therefor. The check received upon its face that it was given "In full of a/c to date," and the receipt which was delivered by plaintiff at the time it received the check is as follows:

"Dalhousie, N.B., July 24th, 1920.

Received of Fred Tempest the sum of Eight Hundred Twenty Dollars Eighty-seven cents ($820.87), which is in full payment of all demands to date, and particularly for the work done and labor furnished in connection with the building operations on the Lister property at Dalhousie, N.B., partly covered by contract and otherwise, and in giving this receipt in full for the water-shed that there are no unpaid bills outstanding for material or labor which will in any way cause or may be the cause of any mechanic's liens upon said building or property and work is hereby certified to by me.

Paid

E. Henry G. Ker
Per C. E. Tenny."

The evidence in the case is voluminous and it is in some particulars contradictory; but it is our opinion that it shows that an actual and bona fide dispute existed between the parties. The learned Judge has granted a new trial on the ground that the verdict in favour of the plaintiff was against the weight of evidence. We cannot say that the evidence shows that plaintiff's claim was for a certain

and liquidated account. The evidence discloses that defendant had no personal knowledge of the matters in dispute between his representative and plaintiff, but an examination of the evidence introduced on behalf of both parties leaves little doubt that prior to the receipt of the check and the giving of the receipt Faulkner and plaintiff's representative had been engaged in a genuine dispute as to the balance due plaintiff.

In deciding the case of Hanlon Coal Co. v. Franklin, 215 Ill., 247, the court said:

> "The amount due from the defendant to the plaintiff was unliquidated and in dispute between the parties. --- In such a case payment of a part actually due or of a less sum than was claimed by the plaintiff, if given and received in satisfaction of the demand, would amount to accord and satisfaction."

If it could be held here, as urged for the plaintiff, that plaintiff had received the check as part payment only of a fixed and certain amount which was due it, then the receipt of the check or the giving of the receipt would not bar a recovery for the whole amount actually due. In such case the agreement to receive a part of the indebtedness for the whole amount due would be without consideration. Ostrander v. Scott, 161 Ill., 370.

In the case of Hanlon Coal Co. v. Franklin, cited above, the Supreme court further said:

> "To constitute an accord and satisfaction it is necessary that the money or check or whatever is offered, should be offered in full satisfaction of the demand and should be offered in such a manner or accompanied by acts or declarations as amount to a condition that if the party to whom it is offered takes it he does so in satisfaction of his demand. If the offer is made in such a manner and it is accepted, the acceptance will satisfy the demand, although the creditor protests at the time the amount received is not all that is due him or that he does not accept it in full satisfaction of his claim. The creditor has no alternative except to accept what is offered with the condition upon which it is offered or to refuse it, and if he accepts, the acceptance includes the conditions, notwithstanding any protest he may make to the contrary."

In the case of Lemmon v. Jno. L. Burns Lumber Co., 137 Ill. App., 295, it was said, "that the existence of bona fides in

the dispute on the part of the debtor in such cases is a question of fact, and as such belongs to the jury to decide." It is asserted that under this holding the question of the *bona fides* of the dispute was properly submitted to the jury. It is quite true that the questions of *bona fides* as to a dispute are in many cases questions of fact which should be submitted to the jury, but cases may arise where the evidence is of such character that but one conclusion as to the character of the dispute may be held, and we think this case is included among the latter. Here the parties were in constant dispute as to the fair and reasonable value of material furnished and services rendered, the value of which had never been fixed by the parties either before or after the work was completed. The evidence is clear that both Vanlee and plaintiff's representative, who received the check and gave the receipt, definitely understood that the check was to be received and the receipt given in payment of a claim made by plaintiff, the fairness of which Vanlee had repeatedly questioned. It is our opinion, therefore, that the judgment of the Circuit court must be reversed and the cause remanded to that court.

REVERSED AND REMANDED.

McDurely and Matchett, JJ., concur.

26767

29 - 26967

JAMES A. KENNEDY,
Defendant in Error,

vs.

TEMPIE ERNESTINE KENNEDY,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

TEMPIE ERNESTINE KENNEDY,
Plaintiff in Error,

vs.

JAMES A. KENNEDY,
Defendant in Error.

225 I.A. 649

MR. PRESIDING JUSTICE DRIVER
DELIVERED THE OPINION OF THE COURT.

Complainant, James A. Kennedy, by his amended supplemental bill prayed for a decree of divorce from his wife, Tempie Ernestine Kennedy, on a statutory charge of adultery. Defendant filed an answer to the bill, in which she denied all of its material allegations, and also a cross bill, in which she charged that she was living separate and apart from complainant without her fault, and she prayed therein for a decree of separate maintenance. Complainant denied the material allegations of the cross bill. The cause was tried before the Chancellor, who entered a decree for divorce in favor of the complainant, and defendant's cross bill was dismissed for want of equity. Defendant seeks by writ of error to reverse this decree. Defendant insists that the decree entered is against the weight of the evidence.

The parties to the litigation were married in Arkansas in July, 1904, and lived together as man and wife for some time thereafter. The evidence introduced on behalf of the complainant tends to prove that the defendant sometime in the year 1906, at Pine Bluff, Arkansas, had improper relations with one R. L. Jones.

A copy of a letter written to defendant by Jones was introduced in evidence on proof of loss of the original, which tends to show that something more than a mere friendly relationship existed between the defendant and Jones. Further evidence offered by complainant tends to show also that she had been unduly intimate with one Victor Simons in Arkansas, and that improper relations had been sustained with him after she, defendant, had moved to Chicago and while complainant was serving as a lieutenant in the United States Army in France.

A witness for complainant, Georgia Porter, testified that the defendant lived in her, witness', home in Chicago; that while there the defendant had admitted different men to her room.

The evidence in the case is conflicting. Defendant, by herself and by witnesses, denied the testimony of complainant's witnesses, but there is ample evidence in the record in support of the decree entered by the trial court.

The decree of the Superior court is affirmed.

AFFIRMED.

McAuresly and Matchett, JJ., concur.

74 - 27033

NELS ANDERSON,
Appellee,

vs.

WARSHAWSKY & CO., a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 649

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in trover in the Municipal court of Chicago for the value of an automobile.

The cause was heard by the court without a jury and judgment was rendered in favor of the plaintiff for the sum of $300. Defendant seeks to reverse this judgment by his appeal to this court.

For defendant it is said that the statement of claim filed in the cause is insufficient, although in the brief filed by defendant it is recited that "the issues raised by the pleadings were on the questions of wrongful conversion and damages."

The statement of claim charges in substance that the defendant obtained from plaintiff by false and fraudulent representations a Cadillac automobile, which at the time was being repaired at a repair shop in Chicago, Illinois; that the defendant appeared at the repair shop and wrongfully claimed the automobile as its property. The defendant filed an affidavit of merits in which it stated that it did not make any false or fraudulent representations to the plaintiff, and that defendant "bought and paid for said automobile from a person in lawful possession of same, with the authority to sell the same."

The abstract of record fails to disclose that the defendant made any objection to the sufficiency of the statement of claim. It filed an affidavit of merits thereto and took issue

upon its allegations. The objection to the statement of claim, being made for the first time in this court, comes too late.

It is our opinion also that there was sufficient evidence introduced on behalf of the plaintiff to warrant the finding and judgment in his favor. Plaintiff testified that he was the owner of the automobile in question; that he had taken the car to a repair shop for repairs by one Harry Landon; that the next time he saw the automobile it was in defendant's yard; that it had been taken apart and junked.

There is no merit in the point made that the evidence fails to show the value of the automobile. Mr. Spencer, who testified that he had been in the automobile business for fifteen years and had bought and sold cars, testified that he had seen the car in question; that he had had it in his shop for repairs in June or July, 1919, and that its then market value was approximately $600. Mr. Nelson, a truck distributor, testified that the car was worth $600. Plaintiff testified that he owned the car in June, 1919, and that he had sent it to the repair shop two or three months later.

While there is some conflict in the evidence concerning the value of the car, we are unable to say that the trial Judge erred in fixing the value at $300.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McBurnely and Batchelt, JJ., concur.

112 - 27062

MINNIE JACOBS,
Appellee,

vs.

HARRY GROSSMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 649

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

June 3, 1919, appellee delivered a diamond ring in pawn to appellant, Harry Grossman, a licensed pawn broker, to secure the payment of $70 borrowed from him by appellee.

About October 7, 1920, appellant sold his pawn brokerage business, together with all articles and property then in pledge to him, to one Jacob Klein, who was also a pawn broker and whose place of business was at Halsted street, Chicago, two or three doors from the place where appellant had carried on his business.

There seems to be no dispute as to any material fact in issue between the parties. The evidence shows that on January 6, 1921, Klein's place of business was entered by four armed robbers; the clerks employed therein were ordered to hold up their hands, and a safe was robbed of a large number of articles, among them being the diamond ring in question.

There is an unimportant dispute in the evidence as to whether the appellee or her sister, after the sale of appellant's business to Klein, had called on the latter and had secured an additional loan upon a diamond ring, not the one in question here. The evidence on this point shows, we think, that appellee's sister and not the appellee was involved in this transaction.

Counsel for appellant insist, first, that a pawn broker is bound only to the exercise of ordinary care of pledged

property, and, second, that a pawn broker has the right to assign or sell his interest in an article placed with him. It may be conceded that where the bailment is for the mutual benefit of the bailee and the bailor, the former will be held to the exercise of only ordinary care in relation to the property pledged. This is the rule as laid down by all of the Illinois cases cited by counsel, not one of which, however, deals with a pledge or pawn of goods with a pawn broker. It may be assumed for the purposes of the present case, that the appellant acted in good faith when he transferred his business and property to Klein.

Under appellant's contract with appellee had he a right, without her consent, to relieve himself from a personal liability to her by transferring her property, in which appellant had only a limited interest, to Klein, thereby relieving appellant from all responsibility for the safe-keeping and return of the property? No one will dispute the general principle of bailment as contended for by appellant, but we think it extremely doubtful that that principle may be extended so as to permit the appellant to assign to a third person, a stranger to appellee, not only appellant's interest in the property, but also the duty imposed upon him by the contract to safely keep and return it to appellee on demand and on payment to appellant of the money borrowed with interest. Appellant's position is that he could by voluntary act turn over to another the duty of safely keeping and protecting the property pledged with him. It is our opinion that under a reasonable construction of the contract in question, when due consideration is given to the character of the business conducted by appellant and the terms of the contract itself, as evidenced by the receipt given appellee by appellant, that appellant could not by an assignment transfer his liability to another. Counsel cite and quote from

several authorities in support of his contention that a pawn broker has the right to assign or sell his interest in an article pledged with him. The authorities and cases cited at first reading seem to support the contention made. These authorities hold that in certain cases an assignee of pledged property may acquire by assignment the rights of the pledgor and that the rights of an assignee of pledged property will be protected as against the assignor, or even the pledgor of the goods. These cases do not, however, solve the difficulty presented by the record before us, where the pledgor brings suit against a pledgee for the value of the property pledged.

In the case of Bailey v. Colby, 34 N. H. 29, relied upon by appellant, it was held that in the great mass of bailments the bailee has no assignable interest in the bailed property. In that case, however, the court said that there is a class of bailments where this ordinary rule does not apply, and where an assignment by the bailee of the property pledged would be enforced and protected "as between the parties," and as against all persons whose interests are not injuriously affected by the transfer. "Of the cases which present themselves as falling within this class, would be the case of a pledge, or pawn, where there is ordinarily nothing like personal confidence, and the contract is in no sense determinable at the pleasure of a party, but the bailee has an interest, or, as it might be said, a quasi estate in the goods till they shall be redeemed."

This case seems to be in support of the contention made by counsel for appellant, except that we are unable to find in the decision that the exception to the general rule was applied in a case involving a pawn. The evidence in the present case shows that without appellee's consent appellant disposed of this ring to Klein, who removed it to a place different from that named in the

receipt given to appellee.

In the case of Lilley v. Doubleday, 7 Queen's Bench Division, cited by appellee, the court said:

> "The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another place and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other."

Our attention has not been directed to any authority which directly decides the question under consideration, that is, in a case where a pledger had brought suit against a pledgee; but we are inclined to believe that on grounds of sound public policy, in view of the special and peculiar character of the business, a pawn broker who receives goods in pledge should not be permitted to transfer his liability to return the property to a third person without the pledgor's consent.

But whatever may be the rule at common law, it is our opinion that section 19, chapter 107 A, page 2243, Hurd's R. S. 1919, prohibited the appellant from transferring the appellee's property in such manner as to effect or limit her right to demand its return to her by appellant on payment of the amount borrowed with interest. This statute is as follows:

> "And no personal property pawned or pledged shall be sold or disposed of by any such pawnbroker within one year from the time when the pledgor or pawner shall make default in the payment of the interest on the money so advanced by such pawnbroker, unless by the written consent of said pawner or pledgor."

The statute provides that no personal property under pledge shall be sold "or disposed of" by the pawnbroker within one year from the time a pledger shall make default unless by the pledgor's written consent. We think this statute applicable to the facts of the present case and that it prohibited appellant from transferring his interest in the pledged property within the time fixed by the statute.

The judgment of the Municipal court is affirmed.

McSurely and Matchett, JJ., concur. AFFIRMED.

123 - 27073

WALTER JOHNSON, a Minor, by
JAMES JOHNSON, his Father and
Next Friend,
Defendant in Error,

vs.

GEORGE C. GRIMM,
Plaintiff in Error.

Errors to
~~APPEAL FROM~~ SUPERIOR COURT
OF COOK COUNTY.

225 I.A. 650

MR. PRESIDING JUSTICE DRIVER
DELIVERED THE OPINION OF THE COURT.

Walter Johnson, a minor, brought suit by his next friend against the defendant, George C. Grimm. A declaration filed in the cause consisting of three counts charged in the first count thereof that the plaintiff on or about October 18, 1918, was riding in an automobile in a westerly direction on Oakton Road; that defendant at the time was operating an automobile in a southerly direction on Milwaukee avenue; that by reason of the negligence of defendant the automobile in which plaintiff was riding was struck with great force and plaintiff thereby was seriously injured. The second count charged that at and just before the time of the accident defendant negligently operated his automobile at a high and excessive rate of speed and that he failed to give any signal or warning of its approach to Oakton Road. The third count alleges that the defendant without regard for the safety of plaintiff wantonly and wilfully ran his, defendant's, automobile into the vehicle in which plaintiff was riding, thereby causing the injuries to plaintiff. A jury which tried the case returned a verdict in favor of plaintiff for the sum of $20,000. Judgment was entered on the verdict and the defendant brings the case to this court for review.

The accident occurred October 18, 1918, about three o'clock in the afternoon of a bright, clear day. Plaintiff was

at the time about ten years of age. Oakton Road and Milwaukee avenue intersect at a point near the village of Niles, which is situated northwest of the city of Chicago. Milwaukee avenue, a cement highway, runs northwest and southeast. Oakton Road is a gravel highway running east and west. At and just before the accident the plaintiff was riding in the rear seat of a Ford automobile which was being driven by his adult brother. Several witnesses testified that the Ford car approached Milwaukee avenue from the east going at a slow rate of speed; that as the car crossed Milwaukee avenue its speed was further decreased. The evidence tends to show that defendant at the time of the accident was driving a large Mitchell enclosed car at a rate of speed which was estimated by plaintiff's witnesses at from 35 to 60 miles an hour. One witness testified that at the time of the collision defendant's car struck the automobile in which plaintiff was riding, "like lightning", and there is abundance of evidence in the record which tends to prove that the defendant gave no warning of his approach to the intersection by blowing a horn or otherwise, and that he did not change the speed of his car until it struck the automobile in which plaintiff was riding.

Defendant testified that as he approached the intersection he saw the Ford car when it was about 2½ blocks from Milwaukee avenue; that when he, defendant, was about 25 feet from Oakton Road he saw that the Ford car was not going to stop and he then applied his brakes; that at the time of the collision defendant's car was going at the rate of ten or twelve miles an hour; that when the Ford car approached Milwaukee avenue it "was going at the regular speed," and that its speed increased when it arrived at Milwaukee avenue; that the Ford car before it reached Milwaukee avenue was moving at about 30 to 35 miles an hour. The testimony of defendant indicates that the cars collided

with great force. He stated that after the collision he had turned his vehicle into a ditch; that it was headed southwest when it stopped with its rear end in the ditch about five feet from the cement roadway.

On cross examination defendant testified that he did not sound any horn, signal or warning of his approach to the intersection; that when he first saw the Ford car he, defendant, was running at the rate of 22 or 23 miles an hour; that he was not 30 feet away from the crossing when he saw the Ford car drive onto the Milwaukee avenue pavement; that he could stop his car when going at the rate of twelve or fifteen miles an hour within fifteen or twenty feet.

Certain evidence tends to prove that after the collision the defendant's car ran a distance of about 150 feet and that in driving this distance it had run off the highway and had stopped with its rear wheels in a ditch.

At the time of the accident plaintiff and his father were occupying the rear seat in the Ford automobile and plaintiff's brother was sitting in the front seat operating the car. All of the three occupants of the car claimed to have received injuries.

The evidence supports the charge that the defendant's car at the time and just before the collision was running at a high rate of speed. Five or six witnesses testified for the plaintiff and their testimony seems to be contradicted by only two witnesses for defendant, one of whom, Schmidt, stated, "Grimm's car, I think, was going about 25 to 30 miles an hour.*** I saw no checking of his speed up to the time of the clash." So also, with reference to the speed of the car in which plaintiff was riding, the preponderance of the evidence shows that it was proceeding on to Milwaukee avenue at a moderate or even a slow rate of speed just before the accident.

We think the evidence shows that the plaintiff was in the exercise of ordinary care for his own safety. It is quite true that a child ten years of age may under certain circumstances be held guilty of contributory negligence. There is, however, in the record before us not a particle of evidence which would tend to charge plaintiff with any negligence whatsoever. His youth was a matter to be considered by the jury. He was seated with his father in the rear seat of the car; he had no authority to control the conduct of its driver. Whether a failure on his part to look for defendant's approaching car would constitute such lack of care as would preclude a recovery in his favor was a question which was properly submitted to the jury, and the evidence is amply sufficient to support a finding that he was entirely free from any negligence which contributed to cause the accident.

It is asserted that a special finding of the jury that defendant wantonly and wilfully ran his automobile into the automobile in which plaintiff was riding, was against the weight of the evidence. This question, under the evidence, was also one for the jury. Nearly all the witnesses, five or six in number, who actually saw the accident, testified that defendant was operating his automobile at a dangerously high rate of speed and this testimony is supported by the position and condition of both cars immediately after the happening of the accident. Operation of an automobile upon a narrow public highway (Milwaukee avenue roadway is only 30 feet in width) at such a high rate of speed tends to show an utter disregard of the rights and safety of other persons lawfully using the highway, and under the circumstances shown by the evidence we think the jury was warranted in concluding that the defendant was consciously guilty of wilful and wanton conduct and that he must have had knowledge of

the dangers consequent upon the manner in which he operated his car. Hernier v. I. C. R. R. Co., 224 Ill., 465. The special verdict of the jury finding the defendant guilty of wilful and wanton negligence was not against the weight of the evidence.

It is said that the trial court erred in giving the special interrogatory following to the jury:

> "Did the defendant wantonly and wilfully run his automobile into and against the automobile in which the plaintiff was riding at the time and place alleged in plaintiff's declaration?"

The jury returned the answer "yes" to this interrogatory. It is urged that the interrogatory assumes that defendant ran his automobile into the vehicle in which plaintiff was riding, and that "in a close case upon the facts" the interrogatory should be free from this assumption. There are several sufficient answers to this contention. First, we do not regard the case as a close one upon the facts. Second, the defendant requested the court to give a similar instruction which requested the jury to answer the interrogatory "Yes" or "No", in accordance with the preponderance of the evidence; (the defendant's tendered instruction was refused by the court for the reason that it was a duplicate of one tendered by the plaintiff). And, third, if for no other reason, the point made cannot be considered because it was not included in or covered by a written motion for a new trial made in the cause, nor by any assignment of error in this court.

Whether defendant was guilty of wanton and wilful conduct, as charged in the declaration, was properly submitted to the jury. A decided preponderance of the evidence seems to support the answer of the jury to the special interrogatory. The question, then, of plaintiff's contributory negligence is not material.

It is our opinion that the evidence shows that defendant's automobile did run into and collide with the automobile

in which plaintiff was riding. While in other circumstances the instruction might not be held good, we think, in the present case it was not error to submit the interrogatory to the jury. Waldron Express Co. v. Kurz, 301 Ill. 473; Weidenreich v. Premner Bros., 260 Ill. 440; Linehan v. Morton, 221 Ill. App. 70.

Complaint is made that the court refused an instruction which told the jury that under the first two counts of the declaration a recovery could be had only for "actual damages or such damages as will make good the actual loss sustained" and that under these two counts exemplary or vindictive damages could not be awarded. The instruction as drawn appears to be somewhat faulty. It does not direct the attention of the jury to such damages as the evidence tended to show was sustained as a result of the injuries. It told the jury that under the first two counts of the declaration only such damages might be recovered as would make good the actual loss sustained by plaintiff. The jury might well believe that this statement of the law would exclude recovery for pain and suffering sustained as a result of the injuries and also other damages which could not technically be regarded as within the meaning of the term "actual loss." We do not think serious error was committed by the refusal to give plaintiff's tendered instruction number four. It stated an abstract proposition, hence its refusal was not error. Hanks v. C. Rys. Co., 208 Ill. App. 594. We think that for other reasons it was not applicable to the present case. The undisputed evidence shows that the car in which plaintiff was riding was, with full knowledge on the part of the defendant, approaching Milwaukee avenue. Defendant at the time was driving his car at a high rate of speed. The jury found defendant's conduct was wilful and wanton and it is our opinion that under the circumstances, as shown by the evidence, the instruction would have tended to mislead the jury with reference to the duty the law imposed upon

the defendant.

It is argued that the judgment is excessive, although it is admitted that plaintiff sustained severe injuries as a result of the accident. The defendant was found guilty of wilful and wanton misconduct and the jury were permitted to add to any actual damages sustained by plaintiff a further sum by way of vindictive or exemplary damages. We are inclined to the view, however, that even if the judgment be regarded as compensatory, it is not so large as to indicate that the jury were swayed by passion or prejudice. The car in which plaintiff was riding was struck with such great force that it was thrown into a ditch running parallel to the roadway and plaintiff was thereby thrown from the car and against a sign-post, which certain witnesses say stood about 25 feet away from the roadway; he was found in the adjoining field, bleeding profusely; a sliver of wood driven through his jaw was extracted. One of defendant's witnesses testified "We picked up the boy and Mr. Charan took his finger and picked the teeth out of his mouth." Plaintiff sustained serious disfiguring head injuries; his leg was broken in at least two places; he sustained a fracture of the knee-cap and remained in a hospital for four or five months after the accident; several operations were performed on his leg and jaw. Plaintiff testified that as result of the accident he lost nine teeth and that his lower lip was torn open. A doctor testifying stated the he saw the plaintiff during the first week in February, 1919, being 3 or 4 months after the accident occurred; that at this time plaintiff had an open wound upon his thigh which showed that his leg had been operated upon; that at this time the knee-joint was stiff. The evidence shows that plaintiff sustained severe and permanent injuries as result of the accident; one limb is somewhat shorter than the other and the knee joint is stiff. We are not ready to say that the evidence shows, as urged by counsel for defendant, that the not result of

the accident to plaintiff is the stiffening of the left knee-cap and the shortening of the left leg. There is evidence to the effect that as a result of the injuries sustained plaintiff's leg became infected and that it has developed a bone decay, causing an open wound upon the leg which discharges blood, pus, and some decayed bone. A surgeon testified that necrosis, a dying condition of the bone, had developed in plaintiff's leg and that as late as March 25, 1941, he, the witness, had taken a piece of bone about "one inch long and one-half inch wide" from the wound on plaintiff's leg. Plaintiff's face was disfigured as a result of the accident. Under all the evidence we are not prepared to say that the verdict of the jury is so large as to indicate passion or prejudice on behalf of the jury.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

McDurely and Matchett, JJ., concur.

298 - 26060

ARMSTRONG PAINT & VARNISH WORKS,
a Corporation,
Appellee,

vs.

CONTINENTAL CAN CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit wherein, upon trial by the court, plaintiff had judgment for $4810.75 for damages claimed because of the alleged breach by defendant of its contract to furnish plaintiff with cans as required by plaintiff.

Upon appeal to this court the judgment was reversed and judgment of nil capiat was entered here, opinion in volume 230 Ill. App. 90. Upon appeal to the Supreme court the judgment of the Appellate court was reversed on the ground that this court had based its judgment on an erroneous view of the law with respect to one branch of the case, and it was remanded with directions to consider and pass upon "meritorious questions properly raised by assignments of error," and which had not been passed upon by us. 301 Ill. 102. The salient facts and issues are stated in these opinions.

Among the points assigned as error by defendant was that the contract called for only the number of cans or packages needed by plaintiff for actual use in its business prior to April 1, 1917, and that the evidence did not show any failure or refusal by defendant to deliver to plaintiff such cans. We hold that the point is well taken.

The Supreme court construed the contract, saying:

"As we view the language used in this contract, it clearly means that the paint company unconditionally obligated itself to buy a minimum of $2000 worth of tin packages from the can company and that it was given the privilege or option of buying more packages if required for actual use in its business. It was

not obligated to buy more packages unless it chose to do so, but if it exercised the option to buy more, the can company bound itself to furnish all the packages ordered, so long as they were needed for actual use in the paint company's business before April 1, 1917."

The evidence tends to show a rise in price of cans and that plaintiff ordered more than was actually needed for use in its business, for the purpose of disposing of them on the market at a profit. The opinion of the Supreme court comments on this as follows:

"The can company filled orders under this contract until it suspected the paint company was ordering beyond its actual needs, and for that reason refused to ship any more packages at the prices quoted in the contract. Considerable correspondence was admitted without objection. February 12, 1917, the can company wrote the paint company, that it recognized the right of the paint company to order all the cans it needed for actual use in its business up to April 1, 1917, but that it did not consider that the paint company had a right to order packages beyond its actual needs, for the purpose of storage. It called attention to the fact that the paint company had on hand 134 crates which it was required to empty and return to the can company, and that this indicated that it was not using the cans which had been delivered to it. To this letter the paint company replied February 14, denying that it was storing up packages or that it was carrying any larger stock than usual. It stated that its increase in orders was due to an unusual increase in business. In this letter it states: 'Our contract with you calls for an unlimited amount of cans, and, as you very well know and must appreciate, we could legally send you orders for enough cans to cover our entire 1917 requirements and you would have to deliver them, and if we don't do this we are passing up an opportunity to make $15,000 or more, which I don't see any good reason for doing.' In a letter dated February 28 the paint company said, among other things: 'It is also our privilege to order out an unlimited quantity of cans on our present contract, and this we propose to do, and will forward you other orders in the course of a few days which we shall certainly insist on your delivering.' In reply to this letter the can company wrote March 3: 'In one of your letters you suggest that you could send us orders for your entire 1917 requirements, and in another letter you advise that you intend to order out a very large quantity of cans. We have to differ with you, for we are only entitled to sell you the quantity of cans which would be for actual use in your business prior to April 1, and only then upon reasonable delivery notice.'"

On the trial an attempt was made by plaintiff to show that cans ordered by it, the delivery of which had been refused by defendant, were needed for actual use in its business,

by asking a witness his opinion as to this. Such testimony called only for conclusions and opinions and was incompetent. There was documentary evidence with reference to plaintiff's gross sales of paint and varnish without any reference to whether these were packed in cans or not. It appears that a large amount of its products was delivered in barrels. There was an entire failure of any competent evidence proving that the kind and size of cans called for by the contract which defendant refused to deliver were needed for actual use in plaintiff's business before April 1, 1919. So far as the record shows, the amount of cans delivered was more than sufficient for plaintiff's needs.

The failure of plaintiff's evidence in this respect amounts to a failure to prove that defendant breached its contract as alleged, and under such circumstances plaintiff was not entitled to damages, and the judgment of the Municipal court will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Dever, P. J., and Matchett, J., concur.

288 - 28080 FINDING OF FACTS.

We find as ultimate facts that defendant did not fail or refuse to furnish any cans or packages to plaintiff, under the contract in question, needed for actual use in plaintiff's business before April 1, 1917, and that defendant did not breach its contract as alleged in plaintiff's statement of claim.

2.39 D

178 - 27142

JOHN M. GIFFORD et al.,
Appellees,

vs.

MERCHANTS RESERVE LIFE INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

225 I.A. 650

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit as beneficiaries of two policies of life insurance issued by defendant on the life of Edwin S. Gifford, and upon trial had a favorable verdict upon which judgment for $4,402 was entered, from which defendant appeals.

Defendant asserts that the insured in his application knowingly made false answers to questions material to the risk, which was such a fraud as to void the policy issued on the faith of such representations. These questions and answers were said to be as follows:

"21-a. Have you had any sickness in the last five years? If so, state what and when, and give the name and residence of attending physician?" Answer, "No." "33. Have you ever had any disease of the following named organs or any of the following named diseases or symptoms?" Then followed the names of about fifty-eight diseases, symptoms and organs of the human body, including the heart. The answer given by the applicant was "No."

It is claimed that these answers were false; that the evidence shows the insured had heart disease at the time these answers were made; that he was aware of the fact and had been treated for heart trouble for a year or two before that time. The applications were made and the policies issued in February, 1911, and in each policy it was provided that it should be incontestable

after two years from its date except for fraud. The insured died in December, 1913.

Was it proven that the insured knowingly and fraudulently made misrepresentations as to the condition of his heart? In the proof of death Mary Gifford, one of the claimants, stated that the insured had had heart trouble "the past year or two;" that the consulting physician was Dr. Heym, and that the cause of the insured's death was "aortic insufficiency - heart failure." Dr. Heym testified that he had treated the insured for about twenty years prior to his death for "general nervousness;" that the direct cause of death was "aortic insufficiency;" that he had this disease "since a few years;" that he never knew of deceased being treated for his heart, and that he had no record showing that he had treated the insured within five years prior to the date of the applications. Dr. Salinger, the examining physician for the insurance company, examined the insured at the time of the applications and reported that the heart action was "uniform, free and steady and the sounds and rythm regular and normal," and that he found "nothing abnormal in condition of heart or blood" and that the functions of the "nervous system" were in a healthy state. It was also shown that in June, 1916, Edwin Gifford made an application for membership in the Central Business Men's Association, in which he stated that he had had "heart trouble 15 years." It also appears that the New York Life Insurance Company issued to him a policy of life insurance in 1903.

A special interrogatory was submitted to the jury as to whether Gifford at the time of making his application for insurance was "suffering from a disease of the heart." To this special interrogatory the jury answered, "No."

The burden of proving the defense of fraud was upon defendant. Gillespie v. Fulton, 236 Ill. 160. To show fraud de-

fendant must prove that the insured at the time of his applications knew he was suffering from heart disease; that he knowingly represented to the contrary for the purpose of having them acted upon by defendant, which relied thereon to its injury.

The jury properly could find that there was not sufficient evidence, if any, to prove that the insured either had heart disease or knew the pathological facts concerning his heart when he made the applications. Most people are unable to determine for themselves as to the condition of the heart and many functional disturbances are frequently attributed to the heart which arise from other causes. The insured's physician, Dr. Hays, testifying on behalf of defendant, did not state definitely that Gifford was suffering from heart disease at the time of his applications, or had been treated by him for such a disease within five years prior thereto. Defendant's own physician upon examination found the applicant's heart to be normal with no evidence of disease.

Under such circumstances the jury properly could conclude that any statement by Gifford as to his heart could not have been falsely made for the purpose of misleading defendant, which acted thereon to its injury. The defense of fraud having failed, the verdict properly followed, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

230 - 27187

CLAUS A. CARLSON,
Appellee,

vs.

BENJAMIN HELLER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 650

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment for $350 upon power to confess judgment for rent contained in a written lease between the parties. Defendant petitioned the court to vacate this judgment which motion was denied, and from this order of denial, defendant appeals.

Defendant's petition and affidavit assert that he had some decorating done in the leased apartment for which he paid the decorator, and he claims he is entitled to set off the amount paid against plaintiff's claim for rent.

It has been held many times that a judgment by confession on an instrument in writing will not be opened up for the purpose of permitting a plea of set-off. Borchsenius v. Canutson, 100 Ill. 82; Ness v. Heffron, 40 Ill. App. 552; Koehler v. Glaum, 169 Ill. App. 537; Levinson v. Pieper, 192 Ill. App. 60; Mansfield v. Stauffer, 201 Ill. App. 123.

A motion to vacate a judgment entered by confession is addressed to the sound discretion of the trial court whose action in denying it will not be reversed unless it appears that the discretion has been abused. Blake v. State Bank of Freeport, 178 Ill. 182.

The order of the Municipal Court is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

242 - 27199

J. J. HANRINGTON & CO., Agent
for estate of R. W. HUNTER,
Appellee,

vs.

JAMES O. KOONTZ,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against him in an action of forcible detainer. Defendant's brief presents a number of points which do not seem to be pertinent but rather tend to obscure the simple questions in issue.

Plaintiff proceeded upon the theory that defendant was a tenant from month to month and March 29, 1921, served notice that the tenancy would terminate on April 30th, following.

Defendant asserts a tenancy from year to year pursuant to a verbal agreement for a term of three years. Such a verbal agreement is obviously void under the Statute of Frauds.

Plaintiff proved a tenancy from month to month not only by oral testimony, but by the recitals in the receipts given when the rent was paid.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

254 - 27212

JOHN GRANDY,
Appellee.

vs.

RELIABLE STORE FIXTURE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 651

MR. JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the balance claimed to be due for commissions arising out of a sale by defendant of certain store fixtures through the assistance of plaintiff, and upon trial by the court had judgment for $197.50.

The evidence tends to show that plaintiff is a manufacturer of ice cream in Savannah, Illinois, where he had a customer, a Mr. Bailey, who wished to buy some fixtures for his place of business, and plaintiff recommended and sent him to defendant in Chicago to secure prices and terms. Bailey thereupon called upon defendant and upon a second visit left his order for fixtures amounting to $2,975. Plaintiff also called upon defendant on the same day and was informed by Mr. Spitzer, defendant's president, as to the sale to Bailey. Mr. Spitzer also instructed the book-keeper to give plaintiff a letter offering to pay ten per cent commissions on sales of fixtures made on orders or to customers sent by him to defendant. This letter specifically referred to the sale to Bailey. Plaintiff at the same time gave Mr. Spitzer information as to Bailey's place of business and made rough drawings as to how the fixtures were to be placed. Subsequently defendant paid plaintiff $100 on account of commissions on the Bailey sale and the evidence tends to show that it promised many times thereafter to pay the balance.

The only point made in defendant's brief in this court is that the evidence shows plaintiff was carrying on a broker's business without a license as required by the Municipal Code of Chicago. This court can not take judicial notice of the provisions of the Municipal Code of Chicago, and as they are not incorporated in the bill of exceptions or record before us, we cannot determine as to any violation of the same. City of Chicago v. Cullen, 191 Ill. App. 97; City v. Noonan, 204 Ill. App. 195.

It may also be noted that plaintiff is a resident of, and does business in Savannah, Illinois, and therefore would not come under any ordinance of Chicago requiring a broker's license. It also appears that defendant is not a broker but a manufacturer.

Plaintiff suggests that this appeal was prosecuted solely for delay and requests that statutory damages be imposed. We are of the opinion that the record justifies this and the judgment is therefore affirmed with statutory damages against defendant of ten per cent, or $19.70.

AFFIRMED WITH STATUTORY DAMAGES.

Dever, P. J., and Matchett, J., concur.

The only point made in defendant's brief in this court is that the evidence does insufficient for conviction on a charge of Malicious injury a license or implied by the statutory use of things. This court has not been faithful to the of the provisions of the Statutory Code of Ohio, but on this ground not considered in the full of consideration it cannot review it, or matter introduced or in the trial below of the case. See of Cincinnati v. Dalton, 101 Ohio, 101; State v. Lemmon, 101 Ohio. 193.

It may also be noted that evidence is a treasure of, and does business in Cincinnati, Ohio. Conviction could not some doubt any evidence of fraud by a driver's license. It also appears that intention is not a matter but a questionable.

Counsel supports that this court has promulgated rules for doing and requires that strictly observe for instance. In view of the opinion that the record jurisdiction this and the Judgment is Reversed efficient this statutory charge against defendant of the per cent, or [illegible].

Judgment [illegible] Reversed.

Cannon, J., and Richards, J., concur.

275 - 27233

LOUIS SCHIMMERS,
Appellee,

vs.

LOUIS A. SECHERER and WARD T. HUSTON, Copartners doing business as Louis A. Secherer & Company,
Appellants.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

225 I.A. 651

MR. JUSTICE McGURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $500 earnest money paid as a deposit to defendants, real estate brokers, on account of the purchase price of certain real estate, and upon trial had a verdict for $500, upon which judgment was entered, from which defendants appeal.

As there must be another trial we shall refer only briefly to the evidence.

Defendants represented the owners of certain property in Chicago. Mrs. Hayward, one of the owners, lived in New York City, and the other owner, a Mrs. Cauchois, lived in France. On or about August 19, 1924, plaintiff commenced negotiations with defendants for the purchase of the premises and signed a form of contract usually used by the Chicago Real Estate Board and gave defendants $500 as earnest money, which was to be forfeited if the purchaser failed to perform the contract promptly on his part. The price was $20,000, which was "subject to the owners' approval." Defendants communicated with the owners, but apparently there was some slowness in obtaining their consent to this price. September 9th defendant Huston suggested forwarding a deed to the owners for their signatures. The form of the deed was submitted to plaintiff's attorney and approved. Subsequently defendants received the assent of the owners by letter and by cable, and defendants thereupon signed the contract for them. Later plaintiff's attorney was informed

that the deed had returned and the deal would be closed. There seems to have been some delay pursuant to the request of plaintiff's attorney, made on November 13th, for further time to examine the abstract. Some question was raised as to the merchantability of the abstract furnished by defendants, but assurance was given that this would be cured, and November 18th plaintiff and his attorney met defendant Buston at defendants' office to close the sale. There was some discussion as to insurance and rents, and other matters upon which the parties ultimately agreed. Some difficulty arose with reference to an affidavit as to mechanics' liens. Plaintiff's attorney also asked for assurance by cable or otherwise as to Mrs. Cauchois being alive at the time of the delivery of the deed, but defendants said they could not, in such a short time, obtain the necessary data to satisfy plaintiff's objections. There seems to have been a tentative agreement that the purchase money and deed would be placed in escrow until these requests could be met. Plaintiff's attorney thereupon dictated an escrow agreement, which in part read as follows:

> "In the event that said abstract discloses that the grantors in said deed have made no other conveyance of said property in derogation of their deed to Louis Cohlmberg if there are no judgments against them or mechanics' liens against the property, then such money is to be held by the undersigned, Seeberger & Company, until such objections are removed."

Defendants refused to sign this on the ground that it was meaningless, which objection was obviously good. Thereupon plaintiff's attorney declared the deal off. The following day defendant Buston telephoned to plaintiff's attorney and offered to proceed with the deal, using the Chicago Title and Trust Company as escrow agent, and this proposal was confirmed by a letter, but these offers were declined by plaintiff's attorney and demand was made for the return of the earnest money.

Plaintiff's counsel argues that there was no contract

for the reason that it was signed in the first instance by the plaintiff only, and therefore was merely an offer by him. This may be true, but it was an offer made subject to the approval of the owners, which was subsequently obtained, and when the contract was executed by their duly authorized agents, which defendants were, the offer ripened into a contract.

The case was very close upon the facts. We have the impression that if plaintiff and his attorney had earnestly wished to consummate the deal, it would have been closed.

Under the circumstances it was necessary that the jury should be accurately instructed. Among other instructions, the court gave on behalf of plaintiff number 1, which is as follows:

> "The court instructs the jury that the action brought by the plaintiff lies in every case where one person has received money under such circumstances that in equity and good conscience he ought not to retain said money, and if the jury find that the defendants in equity and good conscience should not retain the deposit made by the plaintiff, then your verdict should be for the plaintiff."

This was merely an invitation to the jury to exercise a kind of curbstone justice, suggesting that as plaintiff got nothing for his money it should be returned to him regardless of whether or not his own actions prevented the sale. It was highly calculated to mislead the jury on the fundamental question as to who was responsible for the failure of the transaction. The giving of this instruction was prejudicial error.

Complaint is made of the refusal of the court to give instruction number 6 at defendants' request, which was in substance that the acknowledgment of the deed from Mrs. Hayward and Mrs. Cauchois constituted *prima facie* proof that they were living at the time of the acknowledgment and that it would be presumed as a matter of law, in the absence of proof to the contrary, that they were living when the deed was tendered to plaintiff and that the burden of proving the contrary rested upon plaintiff. It is

conceded that this instruction correctly states the law. *C. & A. R. R. Co.* v. *Hagman*, 185 Ill. 70. It would have been proper to give this instruction. While it is true that this presumption did not make it improper for plaintiff's attorney to demand definite proof on that subject, yet the jury should be informed as to the law so as to be able to pass upon the attitude and good faith of plaintiff's attorney in making this demand as *ahne sua non*.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

239 Ill.

237 - 27245

JOSEPH EDERSOAN,
Appellee,

vs.

VICTOR JAHN,
Appellant.

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

225 I.A. 651

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging personal injuries inflicted by defendant in negligently driving his automobile and in violation of a city ordinance, and upon trial had a verdict and judgment for $2,000. Defendant appeals.

The accident happened at the corner of Halsted, a north and south street, and Willow, an east and west street, in Chicago. Plaintiff, going to his place of business in the morning, approached a south-bound Halsted street car to board it, and was struck by an automobile owned and operated by defendant.

With due regard to the variant stories of the witnesses to the occurrence, the jury properly could believe that plaintiff walked from his home, which was west of Halsted street, to the northwest corner of Halsted and Willow. He there stood on the sidewalk waiting for a south-bound street car. As it approached it came to a stop and plaintiff stepped off the sidewalk and into the street, walking towards the street car. When he was about opposite the center of the street car defendant's automobile came from behind it, running close to it. Plaintiff attempted to avoid being struck by the automobile but did not succeed.

Defendant's negligent driving caused the accident. His attempt to pass the street car which was stopped for the purpose of taking on passengers was a violation of the ordinance of the City of Chicago making it unlawful for a person driving a

vehicle "upon the streets of the City of Chicago upon overtaking any street car which is stopped for the purpose of discharging or taking on a passenger or passengers to permit or cause said vehicle to pass or approach within ten (10) feet of said car as long as the said car is so stopped or remains standing for the purpose of discharging or taking on a passenger or passengers." (Section 2484 a, Article 5, Chapter LXXIII, Chicago Code, 1911.)

Defendant's theory was that he was driving ahead of the street car and that plaintiff crossed over from the east side of the street. There was sufficient evidence to discredit this theory with the jury. The conductor of the street car said: "The automobile was behind me in the street car track and was coming behind us when we stopped, and when we stopped the machine skidded around the corner of the car and went right along on the right-hand side of the car. When I saw him he was coming pretty fast."

The damages awarded are not excessive. There was testimony that plaintiff's head was fractured, the tongue torn, the left leg injured and two of his ribs fractured. He was in the hospital for three weeks receiving treatment, especially with reference to the injured head. He did not return to work for some ten weeks after the accident, and testified that he still suffered pains in his head. Defendant introduced no testimony of any physician tending to question the extent of plaintiff's injuries.

The verdict is not contrary to the weight of the evidence nor are the damages excessive. No other points are presented in the brief, and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

27254

296 - 27254

SIDNEY MORRIS & COMPANY,
a Corporation,
Appellant,

vs.

AMERICAN VULCANIZED FIBRE CO.,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 651

MR. JUSTICE McCUNNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming $325 damages because of the failure of defendant to fulfill a contract whereby plaintiff purchased from defendant three gross Velvet baskets. Defendant denied that it made any contract with plaintiff as alleged. Upon trial by the court there was a finding against plaintiff and a judgment on the finding, from which it appeals.

The evidence tended to show that a sales agent for defendant on October 23, 1919, made a written memorandum proposing to sell to plaintiff a number of Velvet baskets which contained the words, "Order accepted by and delivery promised in two weeks, subject to price." This was signed by the agent. We hold that the trial court correctly construed this to mean that the sale was subject to the approval and acceptance of the price by the agent's principal, the defendant here. Defendant took no action in the matter indicating any acceptance or approval either by shipping the goods or communicating in any way with plaintiff. After the expiration of the two weeks plaintiff brought suit for breach of the alleged contract.

Where the price was subject to acceptance of the vendor, who takes no affirmative action thereon, is there a binding contract between the parties?

Plaintiff's counsel does not make the point in his brief claiming a contract between the parties, but presents only the question of damages. We know of no case where under such circumstances the mere silence of the party to whom the proposal is made has been construed as an acceptance. Such a paper is merely an offer and does not become binding until it is accepted in some definite way by the party to whose approval it is made subject. Vaughn v. Slater, 147 Ill. App. 441; Sheboygan Paper Co. v. Swigart, 140 Ill. App. 314.

A contract of sale to be enforcible must be definite as to amount, price, terms of payment and time of delivery. Kelf v. Kelly, 204 Ill. App. 178. Defendant's failure definitely to approve and accept the contract left it merely an unenforcible order. There was therefore no contract upon which plaintiff could assert a breach and consequent damages.

The judgment of the Municipal court is right and is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

308 - 27343

FRANK V. CENTELLA,
Appellee,

vs.

MORRIS AND COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

225 I.A. 651[5]

MR. JUSTICE McMURRAY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for compensation for personal injuries caused by the collision between an automobile in which he was riding and a motor truck owned and operated by defendant, had a verdict and judgment for $1,750. Defendant appeals.

There is no substantial conflict in the evidence. The jury properly could find that the accident happened July 30, 1919, on South Ashland avenue, a street running north and south, in Chicago. Street car tracks are in this street. The accident happened about 2:30 o'clock in the afternoon, at a point about half way between the Chicago river and Twenty-second street. Plaintiff was a guest in an automobile driven by Peter Sarnecki, which was going south on Ashland avenue between the west street car track and the westerly curb, at about fifteen miles an hour; the motor truck of defendant weighed about three and one-half tons, was loaded, and going north on the east side of the street at about fifteen miles an hour. As they approached each other the truck of defendant was suddenly turned to the left directly across the path of the south bound touring car. Sarnecki tried to stop his car and turned it towards the west curb, but was struck by the motor truck and pushed onto the sidewalk. There were some other vehicles on the north bound tracks ahead of the motor truck, and apparently its sudden turn to the west into the path of the south bound car was for the purpose of passing this north bound

traffic. There was no evidence that defendant's driver gave any warning or other indication that he intended to turn suddenly to the west. The move was made so unexpectedly that neither plaintiff nor Sarnecki would have any reasonable grounds for anticipating it. On the other hand, defendant's driver should have known that the sudden turning of his truck towards the west was bound to cause a collision between it and Sarnecki's car.

Under these circumstances the jury was justified in concluding that the cause of the accident was the negligent operation of the car as alleged in the declaration, while the plaintiff was free from any negligence contributing to the accident.

It is asserted that the damages awarded by the jury are excessive. Plaintiff sustained severe bruises on his head and shoulders. The violence of the collision was such as to render him unconscious. He was confined to bed for two weeks with severe pains in his head and was under the care of a physician for approximately six months. There was evidence that for almost two years after the accident he suffered with recurring severe headaches; the physician testified that these were caused by some injury to the brain causing hemorrhages. We find no reasonable ground for holding that the verdict is too large.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

27285

330 - 27288

CHICAGO METAL ANNEALING COMPANY,
a Corporation,
Appellee,

vs.

THE HAYNES MOTOR CAR COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 652

MR. JUSTICE McMURRAY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit, alleging that defendants agreed to deliver to plaintiff a Haynes automobile in consideration of $800 cash and an old automobile in trade; that plaintiff paid the cash and delivered the old automobile, but defendant refused to deliver the new automobile; that plaintiff was entitled to recover the $800 paid and the value of the old automobile, said to be $1,000. On trial by the court judgment was entered against defendant for $900, from which it appeals.

This court heretofore, upon motion, has stricken the bill of exceptions from the record; this leaves before this court only the statutory record, and only two of the assignments of error are relevant. Number 3 is that the trial court erred in rendering judgment contrary to the law, and number 5, that the trial court erred in rendering judgment contrary to the law and the weight of the evidence in this case.

The bill of exceptions having been stricken, this court can consider only those assignments of error touching the statutory record. Kilgore Manufacturing Co. v. Bhagin, 229 Ill. App. 506.

The two assignments of error based upon the statutory record are not argued in the brief of appellant; they must therefore be considered waived. Harvester Co. v. Industrial Board, 308 Ill. 439.

Where the record contains no bill of exceptions and it is not shown that there is error upon the record, the judgment will be affirmed. Helmuth v. Bell, 180 Ill. 263.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

382 - 27340

JOSEPH MACIEJEWSKI, for the Use of CARL PERSON,
Appellant,

vs.

SINGER SEWING MACHINE COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Carl Person recovered a judgment against Joseph Maciejewski for $321.27. Thereafter garnishment was begun against W. Krzyzewski and the Singer Sewing Machine Company and the summons was returned as having been served on both. Krzyzewski appeared, answered, and was discharged. Conditional judgment was entered against the Singer Sewing Machine Company and scire facias was issued and returned as served and the conditional judgment was made final. More than thirty days thereafter this company entered its appearance and made application to set aside the judgment and to discharge the garnishee on the ground that it had never been served with summons and that it owed Maciejewski nothing. This application was treated by the court as a petition in the nature of a bill in equity as provided in Section 31 of the Municipal Court Act, and Person was given leave to file an answer and counter affidavits. Upon consideration the court set aside the order making judgment final and discharged the garnishee.

The record is somewhat confusing as to the appeal. Apparently there were two orders allowing "an appeal of this cause." An appeal is from a final judgment order or decree of the trial court. We know of no proper practice of appealing "a cause."

It was presented to the court that the service of the garnishee summons was ordered by plaintiff's attorney to be

made upon W. Krzyzewski as agent of the Singer Sewing Machine Company, and the return was accordingly made. It appears, however, that this man was not the agent of the company. He has a store of his own at 1800 West 18th street in Chicago, where he carries on the business of selling phonographs and sewing machines. When he sells a sewing machine he gets a commission. The Singer Sewing Machine Company has no interest in his place of business. It was not shown that there were any contractual relations between the company and Krzyzewski. The company is a foreign corporation and has an agent at 1619 West Jackson boulevard in Chicago; it was also shown that there were upwards of fifty stores in Chicago leased and conducted as individual enterprises by persons who sold sewing machines on a commission basis who were not employes of the Singer Sewing Machine Company.

The statute in regard to service, chapter 110, section 8, provides that if the president cannot be found in the county in which suit is brought, a copy of process may be left with "any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any other agent of said company" found in the county.

It has been held in construing this statute that "an agent is a person employed by another to act for him," and that

> "For the purpose of service under said section of the statute such agent must be one actually appointed by the corporation and representing the corporation in some line of employment authorized by its charter, and not one created by implication or construction and contrary to the intention of the parties." Barnard v. C. & E. I. Traction Co., 274 Ill. 181.

Murray v. St. Louis S. & E. Co., 206 Ill. App. 256; C. P. & E. R. R. Co. v. Fuhr, 219 Ill. 572. It has also been held that the return of the bailiff is not conclusive of the fact that the person served was the agent of the defendant and that the mere solicitation of business by persons having no other authority is not doing

business in this state. Deer v. Texas & Pacific Ry. Co., 250 Ill. 378.

Cases like Sherman v. North American Insurance Co., 252 Ill. 179, are not contrary to the rulings above referred to.

The petition to vacate the judgment and to release the garnishee was addressed to the equitable discretion of the trial court. The facts presented fully justified its orders, and they are affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

399 - 3YSLV

AKABEL MANCH,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

225 I.A. 652[3]

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for compensation for personal injuries alleged to have been caused by the negligence of defendant respecting one of its sidewalks, had a verdict for $5,000, and from the judgment thereon defendant appeals.

The only points presented as grounds for reversal are the alleged contributory negligence of plaintiff and the claimed excessiveness of the verdict.

Plaintiff received her injuries from stepping into a hole at the southeast corner of Clark and Adams streets in Chicago. At that corner the outer edge of the sidewalk is on a curve and the sidewalk is about on a level with the street pavement. The hole was about three and one-half feet long, about eight or nine inches wide, and about three or four inches deep; it was on the curve, most of it on the Clark street side; it had been there for some time prior to the accident, and there was evidence that other people had tripped over it. There is a great deal of traffic at this corner both on the street and sidewalks. On the morning of the day of the accident it had rained heavily and the depressions in streets and sidewalks were filled with water. This hole was filled with muddy water which tended to conceal it. Plaintiff had never passed over this sidewalk before this day and had no knowledge of the existence of the hole. She was walking west on Adams street and as she approached the corner, looked to

see which way the traffic was going, and as it was open from east to west she continued to walk west. She glanced downward but on account of the muddy water in the hole saw nothing to distinguish its depth from other puddles in the street. As her right foot came down it went suddenly into the hole, throwing her with her right foot doubled under her.

It has been many times decided that the law imposes no duty upon the pedestrian when using a public street to anticipate negligence on the part of the City; that while he must use reasonable care for his own safety, he has a right to assume that the City has exercised ordinary care to keep the streets in an ordinarily safe condition for persons using such a degree of care, and that such pedestrian is not absolutely bound constantly to fix his eyes on the sidewalks to search for possible holes. Hooks v. City, 203 Ill. 192; City v. Schmidt, 145 Ill. 358; Levine v. City, 175 Ill. App. 39.

The question whether the plaintiff was in the exercise of due care at the time of the accident was properly submitted to the jury, and we are unable to say that under the circumstances as above related, the favorable verdict for plaintiff was against the weight of the evidence.

Plaintiff stepped into the hole in such a manner as to stretch the tendons supporting the arch of her right foot. At the time of the accident she was twenty-nine years old and prior thereto had been in good health, with no trouble from her feet or ankles, and was in the habit of walking a great deal and dancing frequently. She has not been able to dance since the accident and cannot walk without pain; at times a sharp pain strikes her suddenly and she has to support herself to avoid falling. For several days after the accident she wore a boot strap bandage and

later a woven web bandage reaching to the knee cap; she has also been compelled to buy special shoes. Before the accident she was employed as a clerk and also conducted a business in the evening of selling men's shirts and neckties by calling at the homes of her customers. Since the accident she has not been able to carry on this business, which has occasioned a loss to her of about $500 a year. It is earnestly argued that the verdict is so large as to indicate that the jury was influenced by passion and prejudice. It may be that sitting as jurors we would not have awarded so large an amount, but we cannot say that it is so excessive as to vitiate the verdict. An injury to the foot which permanently impairs its use is not a light injury; it is a serious handicap to one's efficiency and enjoyment. We do not feel that the amount awarded is so large that we should be justified in attempting to change it.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

435 - 27398

DAVID B. MUTTNOFFO,
Appellee,

vs.

D. A. SCHULTE, Inc.,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

225 I.A. 652[4]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for $2,500 upon verdict in an action for damages for alleged malicious prosecution of plaintiff, and assault and battery committed on him by defendant.

The declaration in certain counts alleged that defendant had maliciously and without reasonable and probable cause charged plaintiff with embezzlement of three dollars; that his arrest had been caused and that he was imprisoned and kept in jail for six hours, was subsequently tried and found not guilty. In other counts it was alleged that the defendant through its agents assaulted and beat the plaintiff to his injury. Upon trial the court instructed the jury to find the defendant not guilty upon the assault counts and denied the motion to instruct the jury to find defendant not guilty on the malicious prosecution counts, which were submitted to the jury with a verdict favorable to plaintiff.

Defendant contends that the court should have instructed for defendant as to the malicious prosecution counts, and plaintiff assigns cross errors upon the action of the court in instructing for defendant as to the assault counts. We hold that both these points are well taken; that the court should have instructed the jury to find the defendant not guilty as to the malicious prosecution counts, and should have submitted the issues made by the assault counts to be determined by the jury.

The record shows that defendant operates a number of cigar stores and that in June, 1918, plaintiff was employed by it as a clerk in its cigar store at Madison and Clark streets in Chicago. An employe named Parasek was in charge of this store. Towards the latter part of October, 1918, Parasek saw the plaintiff ring up a sale on the cash register for a less amount than the actual amount of the sale. He communicated this to Mr. Feiger, vice-president and manager of defendant's business in Chicago; thereupon, through what is called defendant's service department, a watch was kept on plaintiff to ascertain whether or not he was ringing up the cash register for all the sales made by him and for the proper amounts. One of the employes in this department, Delaney, saw certain sales by plaintiff, who did not register them, and the register tape did not show them. A report of this was made to Feiger. On the following night plaintiff was observed again to omit to ring up certain sales made by him, and the register tape does not show these sales. A report of this incident was also made to Feiger. On that evening plaintiff was ordered to go into the basement of the store, where he was confronted by Mr. Feiger and a Mr. Hamman and charged with embezzlement. Hamman was at that time employed by defendant and was expecting shortly to succeed Mr. Feiger as Chicago manager. He was there at the request of Feiger to assist him in the matter. Plaintiff testified that Hamman knocked his head against an iron post, injuring him, and the testimony of a physician tends to support the presence of injury. Feiger and Hamman both deny that there was any assault and other witnesses testify they saw no evidence of any injuries.

At this interview plaintiff signed a confession of embezzlement, and claims he was coerced into signing it by threats and the assault. Subsequently Feiger consulted an attorney, and-

mitting the reports of the persons who had made purchases of plaintiff, with their statements that he had not registered the same, and also the register tapes showing that such sales had not been registered. The confession also was submitted, and upon counsel's advice Yaiger swore out the warrant upon which plaintiff was arrested.

The evidence shows that plaintiff claims he was confined to his bed for a few days thereafter, and that while there the officer came to serve the warrant, but plaintiff informed him that he would surrender himself when he was able to leave the house; that a few days thereafter he went to the police station and surrendered himself, and says that he was locked up in jail for several hours until he could obtain bail. Subsequently there was a trial on the embezzlement charge and plaintiff was discharged.

In the very recent case of Rhodd v. Patterson, 302 Ill. 355, the established rule is again announced that an action for malicious prosecution is not favored in the law. Plaintiff must show clearly by the preponderance of the evidence that there was neither probable nor reasonable ground for the prosecution of the criminal suit and that it was instituted maliciously. Both want of probable cause and malice must concur. Olson v. Lawrence, 230 Ill. 561; Angelo v. Paul, 85 Ill., 106; McElroy v. Catholic Press Co., 254 Ill., 290; Parris v. Rosenberg, 219 Ill. App. 582.

Plaintiff here not only failed to prove the conditions necessary to maintain his action, but it was clearly proven that defendant acted upon reasonable grounds and with probable cause. Nothing could be more reasonably conclusive to move defendant to prosecute plaintiff than positive statements of its agents, who reported the pilfering of plaintiff, and the records of the tape

register confirming these records. It would seem hardly to require argument that if an employer could not institute criminal proceedings upon such evidence without laying himself open to a suit for damages for malicious prosecution, employers would be deterred from attempting to have a wrongdoer punished in the courts, although convinced by almost conclusive evidence that a crime had been committed.

Not only did plaintiff fail to prove any malice on the part of defendant in instituting the criminal action, but the evidence is in agreement that there existed no malicious motive. The prosecution was instituted by Feiger. He testified that he had known plaintiff about five or six months before and that he had no ill will or hatred against him; that he started the prosecution believing Buttenberg guilty of the offense, and that he was not actuated by any dislike for plaintiff. Plaintiff himself testified that Mr. Feiger was "nice to him. *** Feiger and I were not on the out.*** Feiger had nothing against me that I knew of; he treated me all right."

It is also shown that Feiger did not act until he had consulted with counsel and laid before him all the facts and circumstances in his possession. Glenn v. Lawrence, 204 Ill. 581; Wicker v. Hotchkiss, 62 Ill., 107.

For these reasons the motion of defendant to instruct the jury to find the defendant not guilty upon the malicious prosecution counts should have been allowed and such instruction given. The refusal of the court in this respect was reversible error.

The reasons moving the trial court to give the peremptory instruction upon the counts alleging assault are not clearly presented. Feiger and Hamman, employes of defendant, interviewed plaintiff in the basement of the store to accuse him of embezzling and if possible to obtain a confession. Plaintiff says Hamman assaulted him.

Although there is a considerable amount of evidence tending to negative this claim, it was not for the trial court to weigh the evidence in this respect, but to submit the issue of fact to the jury. In instructing the jury to find defendant not guilty upon the counts charging assault, the court was in error.

For the reasons above indicated the judgment is reversed, and for the errors of the court as indicated the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Hatchett, J., concur.

450 - 27408

CHICAGO SURGICAL & ELECTRIC CO., a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
DR. J. M. FINKE, Appellant.	

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal by defendant from a judgment against him for $90 in an action of trover.

Defendant purchased from plaintiff a surgical instrument under an express warranty, paying $45 on account; the balance of $90 to be paid in thirty days, or the instrument returned; subsequently defendant was of the opinion that the warranty had failed and asked for the return of his $45. Plaintiff refused and started suit for the balance of $90, but upon trial the issues were found for the defendant. Subsequently this action of trover was commenced.

Plaintiff failed to prove that defendant refused to deliver the property. The only evidence touching this point was an alleged telephone conversation, the substance of which is not clear. Apparently defendant was ready to return the instrument whenever plaintiff returned the $45 which had been paid on account. In order to rescind the contract of sale and to become entitled to possession of the instrument plaintiff was bound to pay or tender to defendant the money which had been paid upon the same. McGuire v. Bradley, 118 Ill. App. 59; Bent v. Jones, 172 Ill. App. 62.

The record does not justify the judgment against the defendant, and it is reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

27432

474 - 27432

MARY E. PERRY,
Appellee,

vs.

LEANDER J. IBOLD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 653

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages to her personal property alleged to have been caused by the negligence of defendant, her landlord, and upon trial by jury had a verdict for $525; from the judgment thereon, defendant appeals.

The principal defense asserted is that the defendant was not the owner of nor interested in the premises in question at the time of the occurrence causing the damages. The jury properly could find that plaintiff was a lessee of the apartment under a lease beginning in 1916. A renewal lease in writing was made on March 5, 1918, for a term commencing May 1, 1918, and expiring April 30, 1919. This lease was signed by plaintiff as lessee and by the firm of Ibold & Reynolds as lessors. The Ibold of this firm was the defendant, and it was with him that plaintiff had first negotiated for a lease of the premises. In May or June, 1918, defendant, Ibold, employed some decorators to work in this apartment. Wishing to paint behind the radiators in the apartment, and finding that they could not without removing them, the decorators called upon the janitor and he and they uncoupled the radiators from the supply steam pipe. This janitor worked for Ibold & Reynolds and his wages were paid by checks signed by Reynolds and also by defendant. The janitor left the wrench with the decorators who promised to connect the radiators when they were through painting. They evidently forgot to do this. In September plaintiff left her flat early in the morning and did

not return until late in the evening. In the meantime the janitor turned on the steam and when plaintiff returned she found her rooms "leaking water every place; steam and water all over." She complained to the janitor, who then connected the radiators. Plaintiff testified in detail as to the condition of her furniture and apparel caused by the steam.

While defendant made the statement repeatedly in his testimony that he did not own the property at this time and was not interested in it until 1919, the jury was not bound to accept this as the fact. There was sufficient evidence, some of which we have referred to, to justify the conclusion that defendant was the lessor and interested in the premises and that it was his servants and employes whose negligent conduct caused the damage to plaintiff's goods.

Plaintiff was not guilty of contributory negligence. The evidence does not support the assertion of defendant that the radiators were disconnected under orders from plaintiff.

The provision of the lease that the tenant would keep the premises in good repair, does not exempt the landlord from liability for damages caused by his negligence. Aaron v. Schoeppe, 213 Ill. App. 688.

Plaintiff was competent to testify as to the damages, especially to the articles of clothing, and the damages to the furniture were proven by an experienced upholsterer.

Defendant says that the court instructed the jury in substance that defendant must prove his defense by the preponderance of the evidence. This is not justified by the record. Instructions were oral and the jury was plainly told that the plaintiff was bound to prove every material fact by the preponderance of the evidence. If defendant's counsel thought there was any ambiguity in other parts of the instruction touching this point, he should have objected thereto so that it might be corrected if necessary. The

and refuse until late in the evening. In the meantime the janitor turned on the lights and when plaintiff returned he found her room "flooded with very glaring light and water all over." The complaint is the janitor, who then informed the insurance company. Plaintiff sued in tort as to the existence of her injuries and expenses caused by the fall.

Some difficulty with the statutory relationship is as unknown this in the not even the property in this case and was discovered in 1 Wells 2723, the jury did not begin to notice this in the fact. Court has established (1)(2), when of which we have relied on, in justify the conclusion that defendant was the lessor and interested in the premises and that by her his servants and employees those negligent conduct caused the injury to plaintiff's person.

Plaintiff has met burden of constructing negligence. The evidence has met burden the sufficiency of evidence that the railroad was intermediary under strict from liability.

The provisions of the lease that the lessor must keep the premises in good repair, does not remove the landlord from liability for injuries caused by his negligence. Mullin v. Lynchburg, 121 Va. 100, 100.

Plaintiff was compelled to notify as to the condition, responsibility to the violation of statutes, and the changes in the fixtures were proven up by independent witnesses.

Defendant says that the court instructed the jury in substance that defendant will prove has defense by the proximate cause of the failure. This is not provided by the record. Instructions were read and the jury was clearly told that the plaintiff was bound to prove every material fact in the proximate of the injury. It unnecessary require insert there was negligence in light house of the landlord (tenant) (all jury), he should take related charge so that it might be corrected if necessary. The

record shows that defendant's counsel was called upon for suggestions as to the instructions, and certain suggestions were made which were followed by the court. Defendant's counsel was then asked if there were any other objections or suggestions as to the instructions and counsel replied "That is all."

Defendant has had a fair trial and no reason has been made to appear why the verdict of the jury should be disturbed. The judgment is therefore affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

84 - 27604

MARTIN PIATEK,
Appellant,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in the trial court, who is appellant here, sued the defendant appellee in an action on the case for personal injuries. The declaration in several counts alleged that on February 3, 1919, the plaintiff in the exercise of due care was crossing Ogden avenue when, through the negligence of defendant, plaintiff was struck and injured by a cab driven by the servant of defendant. At the conclusion of plaintiff's evidence the court, on motion of defendant, directed a verdict in defendant's favor, and judgment was entered against plaintiff on the verdict so rendered.

The error assigned and argued is the direction of this verdict. It is conceded that there was evidence tending to show that defendant was negligent, but it is the contention of appellee that there was no evidence tending to show due care on the part of plaintiff, and that in the absence of such evidence it was proper that the court should direct a verdict.

The rules of law applicable are well settled in this State. Contributory negligence by a person who has been injured is not a matter of defense. On the contrary, due care is a necessary element of a cause of action, and the burden of proof is on the plaintiff to show due care on his part. Kennedy v. Gunther, 83 Ill. 384; C. B. & Q. R. R. Co. v. Levy, 140 Ill. 283. The rule which is to be applied in determining whether the evidence

should be submitted to a jury is also well settled. If there is any evidence from which, standing alone, the jury can reasonably find that all material averments of the declaration are proved, the cause should be submitted to the jury. Libby, McNeill & Libby v. Cook, 222 Ill., 212; McBrearty v. Reid, Murdoch, 176 Ill., 464; Kelly v. Chicago City Ry. Co., 255 Ill., 640; McMenna v. Chicago City Ry. Co., 296 Ill., 314.

The evidence most favorable to plaintiff must be taken as true.

The motion of defendant for an instructed verdict raises a question of law, and in considering the case it is the duty of the court to adopt the state of facts in the record most favorable to the plaintiff. It only remains, therefore, to apply these rules of law to the evidence in this record.

The evidence tends to show that the accident in question occurred February 3, 1919, at the intersection of Leavitt street and Ogden avenue in the city of Chicago, at about 9:30 p. m.; that Leavitt street runs north and south and Ogden avenue northeast and southwest; that the streets at this intersection were paved and well lighted; that there was a little rain and the streets were damp and slippery; that plaintiff was returning home from a lodge meeting and was walking north on the east crosswalk of Leavitt street; that defendant's cab was being driven in a southwesterly direction on the right side of Ogden avenue and in the car track; that the streets were practically clear of traffic, and that there was no noise or confusion in the street.

The evidence also tends to show that the cab which struck and injured plaintiff was running at a speed of forty miles an hour; that it gave no warning of its approach and did

not carry any lights. This section of the street was well built up and the rate of speed was clearly unlawful. Plaintiff was returning from a lodge meeting with some friends, with whom he was conversing as he approached Ogden avenue. He says: "As I came up to this crossing and determined whether or not the way was clear, I looked around and did not see anything coming from either direction and I started across. I was following the sidewalk crossing." Mrs. Flynn, who saw the accident, testifies: "It was a yellow cab, and this man was coming across the street on Ogden and Leavitt; they all came in, and this cab was coming awful fast. He didn't even slow up when he got to the street car tracks; he just kept going right on, and it went right over the street car tracks. It didn't ring the bell, and it went right over the line and this man here. He was coming west, and hit him and he fell, and then the cab went on, skidded a little bit because it was kind of rainy that night, about from here over to the door, and then they came back and picked him up." With reference to the conduct of plaintiff she says: "He was walking like anybody, I guess, and he kept right on walking up to the time he got struck, and he didn't stop or he didn't hurry and go faster." Another witness says: "My eyes were on him all the time, and he kept going on right straight north all the time, and he was walking all the time, walking pretty slow. He was a slow man for walking, I can tell you that, and he kept walking the same rate, and he didn't change his speed at any time. He didn't start to walk faster before the car hit him. He looked around; he didn't walk any faster, and he didn't stop. He stopped a minute at the south track before he got on the north track. I think he let another machine go by; he spent a long time, and I can't think just what went by there, but I think he let a machine go by; I think he spent a long time there; when

he spent a long time standing still, he was right on the curb of Leavitt and Ogden; that is, the south curb of Ogden. He stood there a few minutes or so, and he let some automobile go by. After he let the truck go by he started on walking, and before he got on the track the truck was on the other side of Taylor street. Taylor street crosses Ogden avenue not very much north of there. This truck he let go by had crossed Taylor street before he started to walk across the street, so that there wasn't anything that I noticed obstructing his view as he walked out into the street, walking slowly and from that time right on up until he was struck, he didn't change his rate of speed at any time."

It is the contention of defendant that under the circumstances and conditions disclosed it must be held that plaintiff either negligently failed to look, or, if looking, negligently failed to see the approaching cab, and it is argued that if he had so looked he would undoubtedly have seen it in time to avoid the injury.

All the conditions and circumstances must be taken into consideration. He was not bound to look at one particular place all the time. He apparently did not know that the cab would approach at the time it did and from the place from whence it came. This was an intersection where, in the exercise of due care, it was necessary for the plaintiff to have regard for the several directions from which vehicles might approach. We think the speed at which the automobile approached the crossing was not only material on the question of determining whether or not the defendant was guilty of negligence, but that it was also a material matter to consider in connection with the determination of whether plaintiff was in the exercise of due care. The evi-

dence tends to show that plaintiff carefully looked before attempting to cross the street, and that he looked immediately before he was struck by the cab.

We think all the circumstances - the time of night, the condition of the streets and the weather, the bright lights at the crossing, the failure of the cab either to carry lights or give other warning of its approach, the terrific rate of speed at which it moved - all tend to make it a question for the jury whether plaintiff was in the exercise of due care. Whether our conclusion would be the same if the question were before us as an issue of fact to be determined, is an entirely different matter, but we hold the case should have been submitted to the jury.

For these reasons the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McMurray, J., concur.

39 - 27017

MELDA ACKERSON,
Plaintiff in Error,

vs.

A. J. OCHSNER,
Defendant in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

225 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a case in which the plaintiff in error, who was plaintiff below, filed a declaration in which she alleged that defendant was a surgeon; that she employed him to operate on her for a reward to be paid; that it became defendant's duty to use care, skill and diligence, but that he was careless, negligent and unskillful in that he permitted a piece of gauze, wound and matted, 14 inches long and 7 inches wide, to be and remain inside the body of plaintiff and sewed up the wound with the gauze remaining therein, and that it so remained from the date of the operation May 30, 1910, until December 5, 1910, to her damage and injury.

The defendant filed a plea of "Not guilty;" the cause was submitted to a jury, which returned a verdict for defendant. Motion by plaintiff for a new trial was over-ruled and judgment entered against plaintiff on the verdict.

The principal error assigned and argued in this court is that the court gave to the jury an instruction, No. 8, which was as follows:

> "Respecting the issue of the supposed negligence of the defendant: The duty of the defendant was the use of all ordinary care and caution, and by ordinary care and caution the court means that degree of care and caution which an ordinary cautious and prudent physician and surgeon would have used under like circumstances. The defendant was not a warrantor or insurer of cure to the plaintiff."

Plaintiff in error urges that defendant under the circumstances was obligated to use more than ordinary care and

omission; that he was a specialist. The plaintiff's declaration, however, is not framed on the theory that defendant contracted to use the care of a specialist. But had it been so framed, and if there were also facts in evidence tending to support such an allegation, the degree of care required would not be different. In such a case the degree of skill and care required would be that "ordinarily possessed by physicians who devote special attention and study to such organ or disease." 21 R. C. L. 387.

The declaration here does not set up a special contract, and the general rule in such a case is that "in the absence of a special contract otherwise providing, a physician and surgeon ..... impliedly contracts that he possesses that reasonable degree of learning and skill ordinarily possessed by others of his profession, and that he will use reasonable and ordinary care and diligence...." McGraw v. Barr, 138 Pac. 870-872; Merrill v. Osborne, 94 Atl. 783; Chamnion v. Sieth, 67 Pac. 845-846. In Utley v. Burns, 70 Ill., 164, the court said:

> "Whatever may be the character of an injury a surgeon is called upon to treat, he is only held to employ a reasonable amount of care and skill - to exercise only that degree of skill which is ordinarily possessed by members of the profession."

And in McKevins v. Lowe, 40 Ill. 209, the Supreme Court criticised an instruction to the effect that more than ordinary care and skill was required in such case, saying:

> "This states the responsibility of a physician too strongly, as it requires the highest degree of care and skill, whereas only reasonable care and skill are necessary."

In McKee v. Allen, 94 Ill. App., 147, this court stated the rule to be:

> "It is the duty of physicians and surgeons to exercise reasonable and ordinary care, skill and diligence in the practice of their profession. To this extent they are liable and no further."

Again in Goodman v. Bigler, 153 Ill. App. 361, this court said:

"A physician is only held to the exercise of ordinary skill, and in an action for malpractice, the burden of proof is upon the plaintiff to show the want of ordinary skill and diligence, and to show that the injury alleged resulted from a failure to exercise these requisites."

And in Fisher v. Nicoulin, 2 Ill. App. 454, the defendants asked the court to instruct the jury,

"That if they believe the defendants used ordinary skill and care in the treatment of plaintiff's hand, and made a mistake in judgment, then the defendants are not liable for the result of such mistake under the law."

This instruction was refused as tendered, and the court modified it by adding a statement to the effect that the defendant should regard the well settled rules of medical science. The court held that "the instruction properly stated the law without the modification." So also Krueger v. McCauchey, 149 Ill. App. 440; Quinn v. Donovan, 85 Ill. 194.

It is also urged that the instruction is erroneous in that it uses the term "ordinary" care instead of "reasonable" care. The cases hold that these phrases are equivalent. Thus in Kendall v. Brown, 74 Ill., 232, the court in discussing this question said:

"There is no substantial objection to the instruction given for appellee. The words 'ordinary' and 'reasonable' used in defining the nature of the care and skill expected of a physician or surgeon in his employment, have been interchangeably used. Higbey v. West, 23 Ill., 386. Perhaps the word 'ordinary' would indicate more clearly to the common mind the degree of care and skill which he (the physician) is bound to exercise in his professional engagements."

In B. & O. S. W. Ry. Co. v. Faith, 178 Ill., 58-60, the Supreme Court said: "'Due care,' 'ordinary care,' and 'reasonable care' are convertible terms." To the same effect are I. C. R. R. Co. v. Noble, 142 Ill., 578-584; C. B. & Q. Ry. Co. v. Yerty, 158 Ill., 321; Mitchell v. Libby, 149 Ill. App., [illegible]; Texas & N. O. R. Co. v. Walker, 138 S. W. 99-106; Manley v. St. Louis I. M. & S. Co., 107 S. W. 903-904; Interna. & G. N. R. Co. v. Trump, 94 S. W. 903-906. Also in vol. 4, Words and Phrases,

page 149, it is said:

> "'Reasonable and ordinary care,' which in law have the same meaning, is the care which reasonable and prudent men use under like circumstances."

Plaintiff in error also criticises the instruction because, she says, it does not require the exercise of the care of cautious and prudent surgeons in the same locality. We think this criticism is without merit. As defendant in error points out, the instruction is limited to the question of care only, and the degree of care required is the same whether the operation be in a large city or a small one. True, skill may vary with different localities and different opportunities for learning, but the instruction did tell the jury that the defendant was bound to exercise that degree of care and caution which an ordinarily cautious and prudent physician and surgeon would have used in like circumstances, and these like circumstances included all the facts, among which were these - that the operation in question was performed in a hospital located in the city of Chicago by a surgeon practicing his profession in that city. Heitzman v. Ney, 18 Ill. App. 450-461, is relied on, but does not, we think, sustain the contention of plaintiff in error.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McCurdy, J., concur.

2406

116 - 27066

MAYER AVENUE GARAGE,
a Corporation,
Appellee,

vs.

MRS. MARY LAMB,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 653

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below, who is appellee here, filed its statement of claim in which it alleged that the defendant was indebted in the sum of $172.40 for storage, work and labor and supplies furnished by plaintiff to defendant, as per an itemized statement attached thereto. In the alternative the same amount was claimed as an account stated. The defendant filed an affidavit of merits, denying the indebtedness and claiming an offset to the amount of $500, in that she had taken her automobile to plaintiff's garage and had given plaintiff specific instructions that it should not permit anyone to take the car out of the garage or use it except upon the personal application of the defendant or upon her written order; but that in disregard of such instructions the plaintiff had permitted the car to be so taken without her knowledge and consent, whereby it was greatly damaged and she was obliged to pay out a large amount of money for the purpose of repairing it. To this claim of offset plaintiff filed an affidavit of merits, denying the material facts averred therein. The court heard the evidence and found the issues against the defendant and in favor of plaintiff and assessed damages in the sum of $107.8[illegible], for which sum judgment was entered.

The statement of claim in this case set up specific items which it alleged were due, but these items were not proved by any competent evidence. On the contrary the court, over the objection of defendant, permitted copies of certain original bills,

which a witness said had been mailed to defendant, to be received in evidence, although there was no notice to defendant to produce the originals. Moreover, it clearly appeared from the evidence that the defendant had at no time acquiesced in the correctness of the bills as mailed to her from time to time; but, on the contrary, rejected and refused to pay them. Aside, therefore, from the incompetent evidence received, there is no testimony tending to show the amount, if anything, which was actually due to the plaintiff, and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McNurely, J., concur.

137 - 27669

24072

ISADORE KARCHMER and LOUIS H. KARCHMER, Copartners Doing Business as KARCHMER IRON & METAL COMPANY,
Defendants in Error,

vs.

SAM BLOOMFIELD, NATHAN BLOOMFIELD and ALBERT BLOOMFIELD, Copartners, heretofore Doing Business as HIGHEST PRICE IRON & METAL COMPANY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

225 I.A. 654

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the defendants in error recovered a judgment for $1,000 entered upon the verdict of a jury. Plaintiffs' amended statement of claim alleged that on June 3, 1918, plaintiffs were in the business of buying and selling junk of various kinds; that they conducted their business at Oklahoma City, Oklahoma; that defendants at the same time were in the same business at that city under the name of Highest Price Iron & Metal Company; that on that date defendants represented to plaintiffs that they, defendants, had purchased a carload of junk which was on the railway tracks; that in order to secure this car of junk it would be necessary to pay a draft for $1,000; that if plaintiffs would advance this sum defendants would pay the draft and deliver the carload of junk to plaintiffs at the market price; that plaintiffs thereupon advanced the $1,000, but that defendants did not deliver the junk and refused to return the $1,000 advanced. The affidavit of merits denied the alleged representations, and stated the facts to be that the $1,000 was given in payment for scrap metal which defendants sold to plaintiffs about that time.

The errors assigned and argued question the rulings of the court on the evidence and urge alleged improper remarks of

the jury.

The controversy between these parties involves a clean cut issue of fact as to whether the $1,000, which it is not disputed plaintiffs paid to defendants, was given in payment of junk actually delivered or for junk which was represented to be upon the cars, but which was never in fact delivered. The evidence for the plaintiffs was given by depositions, and no motion was made by defendants prior to the hearing to suppress these or any part thereof; therefore, in so far as the errors assigned and argued are based upon objections made to the introduction of evidence, either on the ground that it was secondary in its nature, or that it stated only the conclusions of the witnesses, the contentions of the plaintiffs in error cannot be sustained. Cook v. Orne, 37 Ill. 187; Dunbar v. Gregg, 44 Ill. App. 327; L. N. A. & C. Ry. Co. v. Shives, 108 Ill. 617; I. C. R. R. v. Foulks, 191 Ill. 37. This statement of the law disposes of all the contentions of plaintiffs in error with the exception of those hereinafter noted.

Plaintiffs in error contend that the court erred in admitting, over their objection that the same was immaterial and irrelevant, testimony of one E. S. Wells, assistant cashier of the Farmers National Bank of Oklahoma City, Oklahoma. Wells testified that he was acquainted with the credits of the bank and with its depositors during the year 1918. He was then asked to tell whether or not the Highest Price Iron & Metal Co. or Albert, Sam or Nathan Bloomfield had an account at his bank during that year in the month of June. Upon objection being made, attorney for plaintiffs promised that he would connect it up and show the court that the evidence was material and relevant, whereupon the objection was over-ruled and the witness replied that they did not. Plaintiffs in error contend that this evidence manifestly proved nothing pertinent to the issues and that its only object and its only effect was to prejudice the jury against plaintiffs in error.

They also urge that the evidence was never connected up as promised.

There was evidence tending to show that plaintiffs in error gave a check for $100 to the order of defendants in error, which check was dated May 31, 1916, drawn on the Farmers National Bank, and that this check was never in fact paid. One of the defendants also stated in his testimony in substance that he secured from this bank a cashier's check for $1,000 in payment of the check in controversy, and that this check was deposited by the defendants and used by them in the course of their business. There was also evidence tending to show that this was not true, and that one of the defendants used the cashier's check for $1,000 to purchase a draft on the Mechanic's & Metal National Bank of New York, payable to himself. We think, therefore, it became a proper matter for inquiry whether defendants in fact had an account with the Farmers National Bank at that time.

Plaintiffs in error also insist that the court erred in permitting Nathan Bloomfield to be interrogated as to his testimony on a former trial of a suit brought by plaintiffs against defendants on the $100 check hereinbefore mentioned. He was asked whether he was present at that trial before Judge Hand, to which he replied, "Yes." The following then occurred:

> MR. MORRIS: At that time did I ask you this question:
> Q. Were you one of the persons doing business under the name of the Highest Price Iron & Metal Company, and did you answer no?
> MR. SHERBURNE: I object to that.
> THE COURT: Objection over-ruled.
> MR. SHERBURNE: Exception.
> A. I don't remember.
> Q. Didn't I during that trial show you this check for one thousand dollars? A. Did you?
> Q. Didn't I show you this check at that time?
> A. I don't know, I will take your word for it.
> Q. And didn't I show you your name on the back of it?
> A. I will answer that the same as before.
> MR. SHERBURNE: I object to this whole line of questions, if the court please, as highly improper.
> THE COURT: Objection over-ruled.
> Exception.
> MR. MORRIS: What is that? A. I don't know.
> Q. Didn't I ask you if you were employed by the Highest Price

Iron & Metal Company?

MR. SHERBURNE: Same Objection as before.

THE COURT: Overruled.

Exception.

A. I could not answer that.

Q. And didn't you say at that time that you were simply a bookkeeper there? A. I could not answer that.

MR. SHERBURNE: I object to this as immaterial, what he did in that suit.

MR. MORRIS: I will make it material. (To witness). Didn't I ask you at that time what your interest was in the Highest Price Iron & Metal Company, and didn't you say you were simply an employe?

MR. SHERBURNE: Again I object.

THE COURT: Overruled.

Exception.

MR. MORRIS: And didn't I ask you whether or not you took this money on the check, and didn't you say 'yes?'

MR. SHERBURNE: The same objection, if the court please.

THE COURT: Overruled.

Exception.

MR. MORRIS: Yes or no?

A. When was that suit commenced?

Q. That was on trial before Judge Hass in June, 1919.

A. I could not tell you what I said two years ago.

Q. Didn't I ask you whether you took that money, and didn't you say they owed you a thousand dollars and that you took the money on the check and left? A. I don't think I said that.

Q. You don't think you said that? A. I could not say for certain, but I doubt it.

Q. You doubt it? A. Yes.

MR. SHERBURNE: That is not proper cross-examination and I again object.

THE COURT: Overruled.

Exception.

MR. MORRIS: Did you do business in Oklahoma City under any other name than the Highest Price Iron & Metal Company?

MR. SHERBURNE: Objected to as improper cross-examination and as wholly immaterial.

THE COURT: Objection overruled.

Exception.

A. I think we did. That was during my stay in Oklahoma City; I don't just remember the name, it was either the Great Western or the Northwestern, something of that nature."

Thereupon, over the objection of defendant, a witness was called who testified that he was present at the trial before Judge Hass, and that Nathan Bloomfield there testified that he, Nathan, was not a member of the Highest Price Metal Company of Oklahoma City in May, 1918; that he had no connection with that company; that he was employed by it as a bookkeeper at a salary of $25 a week; that he, Nathan, had received $1,000 on the check in controversy, and that when asked what he did with the money

Nathan replied that they owed him $1,000 and "I took the money and left."

It is elementary that a witness may be impeached by proof of prior inconsistent statements made about material matters (Craig v. Frutter, 252 Ill. 288) and that a witness may not be impeached on such statements made about immaterial matters.

We think that questions as to the relation which witness sustained to the defendant copartnership at the time of the transaction out of which the suit arose, and as to whether he had received the proceeds of the $1,000 check in controversy, and what disposition the witness made of those proceeds, were all material under the issues.

Plaintiffs in error also insist that the court erred in remarks made during the course of the arguments. In his talk to the jury the attorney for the plaintiff, according to the record, said:

> "He says we are trying to cloud the issues; that I put on an employee, who testified that Nathan Bloomfield swore that he was not a partner in that business, and that is true. There is no evidence in this case as to what the first case was, but the second case ***** ----
>
> The Court: You refer to the suit in which he testified he was not a partner?
>
> Mr. Morris: Yes, when he testified before Judge Mann and said he was not a partner there."

The record shows that it was affirmatively proved that Nathan Bloomfield had so testified and that he did not specifically deny it; but however that may be, this record fails to show that any objection was made at the time to this statement of the court nor motion made to exclude it from the jury nor instruction asked that it should be disregarded. We think if defendants regarded this statement made by the court as prejudicial, they should have at that time made some sort of objection to it. Not having done so, they are precluded from urging it as error here.

We have gone over this evidence carefully and think

that the verdict of the jury represented substantial justice. This having been done, the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McBurely, J., concur.

157 - 27111

A. M. BLOMMEN,
Appellee,

vs.

CARL J. APPELL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 654

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case sued and recovered judgment on trial before the court without a jury. The claim was for coal furnished by the plaintiff to Mary E. Powell, also known as Mary E. Appell, on various dates from December 20, 1918, to February 17, 1920. It is not disputed that the coal was in fact delivered, and that its value was $58.50, which was the amount of the judgment; but the defense is that the coal was furnished at the request of Mary E. Appell and not at the request of defendant; that she was not defendant's agent, and that (while he was at one time married to her) on December 10, 1919, prior to the delivery of any of the items sued for, defendant obtained a decree in the Circuit Court of Cook County annulling his marriage with her.

In an analogous case, Hess v. Slutsky, No. 27041, in an opinion filed April 4, 1923, not yet reported, we held that a plaintiff might not recover. There the plaintiff sued the divorced husband and father for medical services rendered to a minor child whose custody had been given to the mother. We held that the father was not liable in the absence of an express promise, or facts and circumstances from which such promise might be implied; that a plaintiff could not recover under the "Family Expense Statute" where there was no family in fact. It is not necessary to repeat here what was there said.

The judgment is reversed and judgment of nil capiat entered here.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

Dayer, P.J., and Matchett, J., concur.

166 - 27121

JOHN SCHMITZ,
Appellee,

vs.

BORDEN'S FARM PRODUCTS COMPANY, Inc.,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

225 I.A. 654[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a case where the plaintiff brought an action on the case for personal injuries, and on trial before the jury obtained a verdict in his favor for the sum of $3,000, on which the court entered judgment, from which the defendant appeals.

The declaration originally consisted of several counts, but all these counts were withdrawn with the exception of the first, which alleged that defendant was in possession of a certain motor truck operated and maintained by one of its servants acting within the scope of his authority; that plaintiff was passing along Ellston avenue in the city of Chicago, and in the exercise of due care, when the defendant's said truck negligently ran into him, inflicting injuries for which he sued. The defendant pleaded the general issue.

One of the errors assigned and argued is that the court refused to give certain instructions requested by the defendant. These refused instructions are numbers 3, 4 and 7 respectively. By the third requested instruction the defendant asked the court to instruct the jury

> "that the plaintiff and defendant are equally entitled to a fair and impartial trial in this case. You should not be swerved from giving such a fair and impartial consideration of this case by any natural sympathy you may have for the plaintiff because he was injured, or because of his apparent financial condition as compared with that of defendant, even if the same should appear. You are not to allow passion or prejudice to enter into a determination of this case, but should render your verdict fairly and impartially, based on the preponderance of the evidence in the light of these instructions."

Refused instruction number 4 was as follows:

> "You are further instructed that the mere fact standing alone that plaintiff was injured by the truck of defendant, would not warrant you in rendering a verdict in favor of plaintiff. It must further appear that defendant by its driver failed to exercise ordinary care towards plaintiff, and that such failure was the sole cause of the injury to plaintiff."

Refused instruction number 7 was as follows:

> "The court instructs the jury that in this case no wilful or wanton negligence on the part of defendant has been shown."

So far as instruction number 4 is concerned, we think it was clearly not error to refuse it, for the reason that the subject matter of it was fully covered by other instructions given in the case. Refused instruction number 3 was also, we think, in part covered by other instructions, and was also subject to the objection that, as to several propositions, there were no facts in evidence on which to base it.

As to requested instruction number 7, in the original declaration there was a count which charged that defendant was guilty of wilful and wanton negligence. This count was withdrawn, but appellant contends that plaintiff was allowed to argue to the jury that the conduct of defendant was wilful and wanton, and that the instruction should have been given in order to prevent any misunderstanding in this respect. The language used in argument which it is contended justified this requested instruction was as follows: "Now, gentlemen, let us analyze the defendant's story in this case. Don't you think that that driver was guilty of negligence? Don't you think he was guilty of reckless and wanton misconduct, gentlemen?" In view of all the instructions given, we do not think the jury could have been misled by this into a belief that the issue was whether defendant was guilty of wilful or wanton negligence. If that had been the question, contributory negligence on the part

of the plaintiff would have been wholly immaterial, and the jury were repeatedly told in instructions given that if plaintiff was guilty of contributory negligence he could not recover. Under all the circumstances, we do not think the failure to give this instruction was error.

But appellant further contends that as a matter of fact, the plaintiff was, under the evidence, guilty of contributory negligence and failed to prove due care, and therefore could not recover. Some of the uncontradicted facts in evidence were that Elston avenue is a public highway running northwest and southeast in the city of Chicago; that it is intersected by Cortland street, another public highway, which extends east and west; that in the middle of Elston avenue were double street car tracks, over which the street cars ran north and south; that on each side of the tracks was a space of from 12 to 15 feet in width, intended for the use of teams and vehicles. The accident in question occurred February 27, 1930, at about eleven o'clock p. m.

Plaintiff was a workman about 45 years of age. He was employed by the Northwestern Terra Cotta Co., at its plant located east of the scene of the accident, and was returning to his home, walking in a westerly direction on the south side of Cortland street. He carried a beam of wood about six feet long and six inches square weighing 40 or 50 pounds. He proceeded to cross Elston avenue, and when near to the first rail of the east track was struck by a heavy truck owned by defendant which was being driven in a southerly direction on the east or left-hand side of Elston avenue in the center of the northbound street car track. It is conceded that no horn was blown or warning given by the driver of the approaching truck.

The speed at which the truck was being driven; whether it carried sufficient lights; whether under the circumstances the

driver was negligent in driving on the left side of the street; the distance the truck ran after striking plaintiff and the extent of the injuries which plaintiff received; the actions of plaintiff tending to show care or want of it; were all questions of fact to be determined from conflicting evidence, on which, however, the jury has passed and decided in plaintiff's favor.

Plaintiff suggests several respects in which he says the evidence indicates negligence on defendant's part. It is said that defendant's driver proceeded at an improper rate of speed; that he failed to give a signal or warning of his approach; failed to maintain proper lights; drove on the wrong side of the street and failed to keep a proper lookout. The occurrence witnesses for plaintiff were plaintiff, a police officer who was riding on the front platform of a street car which was moving in a southerly direction behind the truck, and the motorman of the street car.

In behalf of the defendant the driver of the truck was produced, and his evidence shows that he was looking backward just prior to the accident and did not in fact see the plaintiff until after he was struck. We have examined all the evidence and doubt whether it shows the rate of speed was negligent; but there is no doubt that the driver turned over to the wrong side of the street, and the contention that this was justified by reason of frozen piles of snow on the street is not sustained by a preponderance of the evidence.

We think the evidence tends to show that the truck carried lights on the front part of it. The failure to carry lights at the rear we think had nothing whatever to do with the accident. But we also think that on the driver's own evidence he was clearly negligent in failing to keep a lookout in front as he approached the crossing, and the jury was justified in finding that defendant was negligent for that reason. The only question

remaining in the case, therefore, is whether plaintiff proved that he was in the exercise of due care, or whether, as defendant contends, he was guilty of contributory negligence.

As defendant's occurrence witnesses did not see the plaintiff until after the accident, no direct evidence was produced by defendant on this point; and the motorman and the police officer also testify that they did not see the plaintiff until after the accident occurred. The question, therefore, of plaintiff's due care and contributory negligence must be determined from the circumstances which appear in the case, as hereinbefore related, and plaintiff's own testimony as to what occurred. He says that he carried the stick on his left shoulder; that when tired he would put the stick down for a little rest; that the stick weighed forty or fifty pounds; that he walked on the south side of Cortland street, going west; that when he came up to Elston avenue he saw a street car which was going north; that when he saw it, it was about fifty feet south of Cortland street; that he watched there for the car to get over. In response to the question, "Tell us how it was then?" he replied, "The car was coming up to Elston; I was come up to Elston avenue, so I stopped, the car was came south and runs up to north, and when the car was over, then I looked, you know, south, and I didn't see nothing on the car track, and then I started to walk, and just then, when I looked north the truck was come." "Q. Right then, when you looked north, you saw the truck? A. Yes, sir." He further says that it was about 30 or 40 feet away when he saw it, and that it was running fast across Cortland street.

Appellant suggests that if plaintiff had looked he would have seen the truck, and that if he did not look he was clearly negligent. That rule is not absolute. In each case the question of whether the plaintiff is guilty of contributory negligence in such a case must depend upon the particular circumstances.

Here the facts that plaintiff was carrying a stick of wood, that it was in the night time, that the truck moved over to the wrong side of the street and approached him, therefore, from a direction which he would have a right to presume it would not come, are all, we think, matters which made the question of his negligence one for the jury, and we do not think that under such circumstances we can interfere with their verdict.

Appellant also makes the contention that the damages are excessive. Plaintiff testified that the truck passed over his shoulder. In view of the weight of the truck, the heavy load it carried, and the nature of the injuries which plaintiff received, we are satisfied that this was not the case. The injuries would have been much more serious had that been true. However, plaintiff's injuries were not light ones. He returned to his work, the evidence shows, on April 15, 1930, and at the same wages he had received prior to the accident, but he did not do the same class of work. He was given lighter work to do. He afterwards went back to his regular work, which was filling boilers. The physician who first attended him says that on examination he found a dislocation of the clavicle at the distal end, at the shoulder end, a fracture of the scapula at the lower angle and a bruise of the muscle over the scapula; that the dislocation of the clavicle was at the shoulder end, right over the shoulder; that the dislocation was forward and outward about three-quarters of an inch; that the fracture was across the outer lower end; that it was a so-called green stick fracture, where the bones will be partly broken and still a fibre left at the lower end, making a sort of hinge of it; that he set the shoulder; that he set the clavicle by strapping it down onto the shoulder and then fastening it backward so that it would stay in position, and set the scapula in an immobile position so it would remain where it was; that he saw plaintiff the first

three weeks about three times a week and after that, probably for a few weeks, twice a week; that he saw him in all he would judge twelve or thirteen times; that he reduced the dislocation and set the fracture and had X-rays taken; that after taking the dressings off he found there was a little crepitation in the outer angle of the clavicle; that there was some atrophy of the muscle attachments at the lower end of the scapula; that this persisted up to the last time the witness saw him; that crepitation is a friction sound, that it shows probably there is some roughness left in the joint, in the articulation, probably some exudate off of it; that there is a slight upward limitation of motion because of the condition the joint is in; that the arm itself works in the socket and is not injured; that the hindrance is in raising the shoulder, not so much the motion of the arm as it is in raising the shoulder, because it is the outer end of the clavicle, due to the condition of the joint. The physician says that the atrophy is probably permanent; that it may last for several years and may never be right; that he charged for his services $125. The X-ray plates were received in evidence.

Another medical expert testified for plaintiff that on examination of the plaintiff objectively he found a creaking noise when he moved the shoulder blade up and down, and found some wasting on the back and shoulder; that on top of the shoulder he found some limitation of motion in moving the arm backwards; he says that the creaking is a rubbing of the shoulder blade and callus on the shoulder blade against the ribs, due to a fracture, and that he found the muscles of the shoulder wasted; he was also of the opinion that the condition as to the limitation of motion and as to the creaking noise was permanent. X-ray plates taken were introduced in evidence, and the defendant introduced medical testimony as to this.

Dr. Knapp, for defendant, testified that he examined the plaintiff February 24, 1930, at his home; that he manipulated the shoulder, raised his arm up and down, and could discover no crepitation or evidence of a fracture; that he advised an X-ray, which plaintiff agreed to, but on the next day refused to have it taken. Dr. Knapp says that the clavicle was normal and in place; that it was not broken, but that there might be something wrong with the scapula, the shoulder blade. Plaintiff's exhibit 2 does not indicate a fracture, nor do the other plates so indicate.

In reply to an hypothetical question Dr. Knapp gave an opinion that the injuries sustained were not permanent. On cross-examination he stated that there might be a slight dislocation.

Dr. Clark, called by the defendant, testified that he had examined the plates thoroughly; that as to the clavicle there seemed to be a slight elevation of the outer end of it and that was about all; that there was a slight separation there; that it was one-eighth to one-quarter of an inch separation; that he could not find any fracture on the plate at the lower end of the scapula. Testifying as to exhibit 3 Dr. Clark said, "The line is across the acromion process of the scapula, and I would hesitate to say that it was a fracture. It is probably due to the other process of the scapula, the coracoid process." He also says that in his opinion the plate does not indicate a fracture of the scapula, and in reply to an hypothetical question said that in his opinion the condition was not permanent.

We are frank to say that if we were sitting as a jury we would not allow damages in so large an amount as the jury in this case assessed; but we do not think, under all the circumstances in evidence, that we can say that the verdict of the jury was so large as to indicate passion or prejudice. The judgment is therefore affirmed.

AFFIRMED.

Dever, P.J., and McCurdy, J., concur.

175 - 27130

WILLIS G. HOWARD, Doing Business as W. G. Howard & Co.,
Appellant,

vs.

JAMES C. DAVIS, Director General of Railroads, as Agent, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.App. 651

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff in the trial court, who is appellant here, filed a statement of claim in which he alleged that on November 10, 1919, he delivered to the defendant 361 tubs of butter in first-class condition, to be delivered by the defendant to the Wisseley Creamery Company of Fort Worth, Texas; that defendant was instructed to keep the car fully iced and maintain standard refrigeration; that owing to the negligence of the defendant in failing to properly ice the car and in failing to furnish a suitable car and in failing to transport the car with safety, the butter arrived at Fort Worth in a damaged condition, to the injury of the plaintiff in the sum of $856.02. The defendant filed an affidavit of merits, admitting that the butter was received for transportation, but alleging that the quantity and quality of its condition was unknown to the defendant; he denied that it was in first-class condition, denied that the defendant was negligent in any respect alleged, and denied that the butter was damaged in any way. The issues were submitted to a jury, which brought in a verdict for the defendant. Plaintiff's motion for a new trial was over-ruled and judgment entered on the verdict. The plaintiff, at the close of all the evidence, moved the court to instruct the jury to find the issues for the plaintiff. This motion was denied by the court, and this is the principal error

alleged and argued here. Appellant says not only that the court should have so instructed the jury, but also that the court should have instructed to assess plaintiff's damages at $833.40, in being plaintiff's contention that the uncontradicted evidence showed that the butter was damaged to the amount of three cents a pound. Inasmuch as the motion did not ask that the damages should be assessed, we cannot hold that there was error in that particular respect.

Nor do we think the court erred in refusing to direct the verdict for the plaintiff.

Plaintiff in its statement of claim did not seek to charge the defendant as an insurer, but alleged specific negligence. This negligence was alleged to be that defendant had failed to keep the car properly iced. The defendant introduced evidence tending to show that it was not negligent in this respect. The plaintiff also introduced evidence tending to show that there was a delay in the transportation, although such delay was not alleged in the statement of claim, and the evidence wholly failed to show that the butter had been damaged as a result of any such delay.

We think there was evidence from which the jury might conclude that the defendant was not negligent in any respect alleged, and we also think there was evidence from which the jury might properly conclude that the butter was not damaged as alleged.

The evidence of experts called by plaintiff, who examined the butter prior to its shipment, was to the effect that the butter scored 90, putting it in the class of first grade butter. The testimony of other experts called by plaintiff, who examined the butter after it was delivered at Fort Worth, was to the effect that the butter, in their opinion, upon its arrival there and in the condition it then was, should have been classed as second

grade butter. One of plaintiff's experts, Mr. Blanchard, was interrogated and answered as follows:

"Q. Mr. Blanchard, what is the difference between first and second grade butter, please sir?
A. Well, it is the quality of it.
Q. How do you determine the difference; is there any test you give it?
A. No, there is no test I give it. I just taste it for my part, I am no expert in the business.
Q. There is a test that can be given to butter to absolutely determine what grade it is, is there not?
A. Yes, sir, I think there is.
Q. You did not test this butter?
A. No, sir.
Q. You are not qualified to make this test?
A. No, sir.
Q. You do not know of your own personal knowledge, do you, Mr. Blanchard, as to what condition this butter was in when it arrived in the car?
A. No, sir.
Q. You did not see it in the car?
A. I did not see it in the car."

There is also in the record uncontradicted testimony to the effect that the score of butter depends to a large extent on the individual who makes the score, and to a great extent upon the market in which it is scored; that there is, for instance, a difference between the score in New York, Chicago, and the South.

We think that under all the circumstances the jury was justified in concluding that the plaintiff had failed to establish that the butter as delivered was first-class, and that at the time of its arrival at Fort Worth it had become second-class butter by reason of any negligence of defendant. There is some evidence tending to show that the containers in which the butter was placed were broken during transportation, and that some damage occurred to the butter for that reason; but it does not appear from the evidence which party was at fault in that respect.

The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McBurnely, J., concur.

184 - 27139

ROSALIE M. LADOVA,
Appellee,

vs.

VITAGRAPH, Incorporated,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $500 entered on the verdict of a jury in an action on the case for personal injuries. The declaration alleged that the plaintiff was walking on Wabash avenue in the City of Chicago, and in the exercise of due care, when she was struck and injured by a truck negligently pushed and managed by defendant's servants. The defendant filed a plea of the general issue.

The only error assigned and argued is that the damages awarded are excessive, and that the judgment should therefore be reversed or a remittitur required.

The plaintiff is engaged in the practice of medicine. The evidence tends to show that the accident by which she was injured occurred about 3 p. m. March 18, 1920, when she was walking upon Wabash avenue. At that time a hand truck, which was about three feet long and eighteen or twenty inches wide, pushed by two boys, was, according to the evidence for plaintiff, negligently swerved around so as to strike one of plaintiff's lower limbs.

Plaintiff says that the blow was so hard that for a moment she thought her leg was broken; that the pain was terrific; that she leaned against a building and stayed there a little while; that she then went into the building and located the boys who were in charge of the truck on the second floor; that she then went to the office of Dr. Seifert, at 13 Michigan boulevard;

that she limped as she walked and was in pain; that the limb was examined there; that there was a swelling on it about the size of an hen's egg; that it was discolored black and blue, and the limb itself was painful and tender; that she then went home, laid down and elevated the limb and applied hot fomentations to it; that she kept this up for about a week, and during that time suffered pain; that the swelling did not subside for two weeks, and the discoloration for six weeks, during which time she stayed at home. She said that the limb pained her whenever there was a change in the weather "like rheumatic pains."

She says, as is customary between physicians, Dr. Seifert made no charge for his services, and she admits that she does not remember that she was called to attend anyone whom she did not attend by reason of the injury.

Dr. Seifert testified that on March 12, 1920, he examined the plaintiff's right limb, and found a bruised area about the upper third of the shin bone, about two or three inches in diameter, black and blue, with the usual symptoms of a bruise and with the usual tenderness; that later in the same month, he saw the plaintiff and then found a swelling and redness with extreme tenderness; that about April the swelling was reduced and her limb was gradually getting better; that there was some induration of little blood vessels, discoloration due to little blood vessels bursting, a little roughness over the shin, being a roughening of periosteal surface where a little skin was off; that he saw plaintiff again, and that the limb was still tender, the blood vessels were visible; that the roughness in his opinion might subside, and it might not.

Dr. Harriest Alexander testified that she examined plaintiff's limb the day before. She testified that she found on the tibia, known as the shin bone, a little below the center of the bone, a discoloration and a depression of the crest of

the bone; that the area of discoloration was probably one and a half inches wide and one inch long. She said that in her opinion, what she calls "a stellate rupture of the blood vessels" would probably be permanent, but she did not think it was progressive, and that the roughening of the surface of the bone would be permanent, but not progressive.

In view of the fact that this evidence fails to disclose any financial damage resulting to the plaintiff from the injury received, and in view of all the evidence as hereinbefore set forth, we are of the opinion that the contention of the appellant must be sustained. We think the sum of $250 will compensate the appellee for the actual injury sustained, and if the appellee will, within ten days, file a remittitur in the sum of $250, the judgment will be affirmed, otherwise it will be reversed and remanded.

AFFIRMED ON REMITTITUR.

Dever, P. J., and McNurely, J., concur.

227 - 27184

DORA BRAND,
Appellant,

vs.

G. T. FRYEMAN,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff below from a judgment entered on the verdict of a jury. Plaintiff sued on a lease which contained authority to confess judgment, and under that authority she caused judgment to be confessed for the month of November, 1920, for the sum of $90 for rent, and $20 for attorney's fees. A motion to vacate the judgment was entered and supported by an affidavit, which appellant has failed to abstract.

The affidavit admitted the execution of the lease upon which suit was brought and states that the defendant took possession of the premises October 1, 1920, and paid rent for that month; that one week after he so took possession, his wife hung on the private back porch of their apartment some baby diapers; that the plaintiff requested that these be removed, and upon the failure to remove them, she, on October 9, 1920, notified the defendant that the plaintiff had terminated said lease, and requested the defendant to surrender possession of the premises; that on October 11, 1920, the plaintiff filed in the Municipal Court of Chicago, a complaint in forcible entry and detainer, alleging that plaintiff was lawfully entitled to the possession of the apartment, and that affiant was unlawfully withholding the same from her; that summons issued and that it was served; that the defendant employed counsel and caused his appearance to be entered in the cause; that on the return day of the summons the cause was continued and set for hearing on November 8, 1920;

that negotiations were opened up between the attorney for plaintiff (who was also her husband) and the defendant, through his attorneys, and that plaintiff through her attorney made a proposition that if defendant would vacate the premises, she would dismiss the suit, cancel the lease and release the defendant from future liability; that this proposition was accepted, and that on October 30, 1930, a written notice was served on the plaintiff, stating that defendant had vacated the premises; that on October 31st the plaintiff entered into possession of the premises, and on November 1st, by her attorney, appeared in open court, and caused the pending suit to be dismissed.

The affidavit further set up a provision in the lease to the effect that if default was made in any of the covenants, the lessor might, without notice, declare the term ended and re-enter the demised premises. The judgment was thereupon set aside and the cause submitted to the jury on the issues as thus made.

The plaintiff upon trial, called the defendant as a witness and identified the lease, then offered the lease in evidence, and rested. Thereupon Edgar J. Phillips was called as a witness on behalf of the defendant, and gave testimony which in substance sustained the material allegations of fact contained in the affidavit.

Mr. Brand, who was also acting as one of the attorneys for his wife, was then called as a witness in behalf of the plaintiff, and testified in general denying these statements of fact. He says that the forcible entry suit was dismissed because the parties had moved out, but denies any agreement by which they were to do so. It seems to be the contention of the appellant that the lease offered in evidence, made a prima facie case for the plaintiff; that the burden was upon the defendant to overcome the case made by testimony, and that, because one witness

testified one way, and the other another, the defendant failed to prove his defense by a preponderance of the evidence.

That the lease made a prima facie case for the plaintiff is undoubtedly true, and that the burden was on defendant to overcome it by evidence, is also true, but it by no means follows that because one witness testified one way and the other another, that the jury were bound to find in favor of the plaintiff. It is for the jury to weigh the evidence, and as was well said in Conway v. City of Chicago, 219 Ill. 295, "the evidence is weighed and not counted."

The jury in this case had a right, and indeed it was their duty, to take into consideration the fact that the only witness for plaintiff was her husband and an attorney trying the case; and the practice of an attorney at law taking part in the trial of a cause and at the same time appearing as a witness in it has been severely criticised by the courts.

It is elementary that the preponderance of the evidence is not alone determined by the number of witnesses testifying, but that the jury may and should consider not only the number of witnesses, but their interest or lack of interest; their appearance upon the stand; their knowledge concerning the things about which they testify, and the reasonableness and the probability of the things to which they testify, etc.

We think on the record, the jury was justified in returning the verdict and the court in entering judgment upon it. The judgment is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

313 - 37276

E. J. LEHNARTZ,
Appellee,

vs.

JOHN T. DOODIE et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

225 I.A. 655

MR. QUINLAN.

Heretofore the appellee made a motion to transfer this case to the Supreme court on the ground that a freehold was involved, which motion was denied. After further consideration we have concluded that we were in error in denying said motion, that a freehold is involved and the cause should be transferred to the Supreme court.

When the motion was first presented we were under the impression that complainant's bill sought only to establish his right to redeem from a foreclosure sale which had already taken place under the former and the present statutory practice where such sales are made shortly after decree subject to the right to redeem within fifteen months thereafter. In such cases it has been held that a freehold is not involved because the award of a right to redeem is coupled with conditions which may or may not be performed, and the decree does not necessarily result in the gain of one party and the loss of the other of the freehold estate. Peterson v. Peterson, 204 Ill., 111; Hallinger v. Hallinger, 252 Ill., 123; Burroughs v. Kotz, 226 Ill., 42.

We had overlooked the fact, if it was suggested, that the sale in the present case was under the statute in force July 1, 1917, which provided that the sale shall be after the expiration of fifteen months from the date of the first certificate. Illinois Laws, 1917, Callaghan, pages 1193 to 1198. A sale under this

statute is not made subject to the right of any equity of redemption, but such right is thereby barred.

Complainant's bill is not seeking so much to establish a right to redeem as to establish the fact that he had already done all those things required by law to be done to entitle him to a certificate of redemption, which the Master improperly refused to issue.

The bill also seeks to set aside the sale and the Master's deed as void on the ground that the judgment creditor under whom redemption was made was not a judgment creditor within the meaning of the statute and therefore said redemption was null and void, and the Master's sale and deed based upon this judgment were null and void.

It is also charged that the Master's sale and deed are void because of failure to observe certain statutory requirements. Should these allegations ultimately prevail it would necessarily result in the gain of one party and the loss of the other of the freehold estate.

As the Supreme court has exclusive jurisdiction on appeal of such case, an order will be entered transferring this case to the Supreme court of this State.

CAUSE TRANSFERRED TO THE SUPREME COURT.

Opinion filed May 17, 1922.

11 - 26698

LEON M. WALDMAN,
Defendant in Error,

v.

WILLIAM McGUFFIN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 6

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On September 27, 1920, a judgment by confession was entered in favor of plaintiff and against the defendant for $225.00. On October 21, 1920, the defendant moved the court to vacate and set aside the judgment which motion was entered, and the court ordered that the judgment be opened and leave given the defendant to file an affidavit of merits within five days. The affidavit was filed and subsequently, on November 29, 1920, on motion of plaintiff, the affidavit of merits was stricken from the files on the ground that it did not set up a defense as a matter of law. Thereupon the court vacated and set aside the order entered on October 21, 1920, opening up the judgment, and denied the motion to vacate the judgment. From this the defendant prosecutes this writ of error.

Plaintiff's claim was for rent due under a written lease. The affidavit of merits which was stricken set up that the defendant had a good defense to the whole of plaintiff's claim. The lease demised the premises to the defendant from October 1, 1919, until September 30, 1920, and the defense sought to be set up in the affidavit of merits was

that the defendant had surrendered the premises on June 14, 1920. Plaintiff's claim was for rent for the months of June, July and August, 1920. The affidavit of merits, so far as material, set up "that on or about the 15th day of April, 1920, plaintiff verbally agreed to the cancellation of said lease on two weeks' notice and payment of rent for the period of occupancy, and that on June 14, 1920, defendant, relying upon said agreement and after giving two weeks' notice of his intention, vacated and surrendered the premises to the plaintiff who immediately took possession of same." The affidavit of merits further set up that on June 9, 1920, defendant sent a check for $37.50 to the plaintiff in payment of rent to June 15, "together with a letter again stating that defendant would vacate said premises June 14, 1920, pursuant to agreement, which check and letter were received and retained by the said plaintiff without protest until July 10, 1920." The affidavit further set up that between June 15 and September 1, 1920, plaintiff had many opportunities to re-rent the premises but refused to do so for a less rental than $100.00 per month.

Of course, it is the law that premises occupied under a lease under seal may be surrendered, and that this may be shown by parol testimony. Alschuler v. Schiff, 164 Ill. 298. But we think the affidavit was insufficient and, therefore, properly stricken because it does not state facts, but merely conclusions, and this too even though we construe it more liberally in favor of the defendant than under the practice that obtained at common law. The affidavit says that the plaintiff verbally agreed to the cancellation of the lease, and that the defendant vacated and surrendered

the premises to the plaintiff after giving two weeks notice. We see no reason why the defendant could not state more facts in his affidavit of merits, and we think the court was entirely justified in holding it insufficient. But counsel for the defendant say that the affidavit of merits contains the same allegations as those in the affidavit read in support of his motion to open up the judgment and which motion was allowed by Judge Wells. An examination, however, of the affidavit read before Judge Wells, as it appears in the files of the case in the Municipal Court, does not sustain counsel's contention for in that affidavit the facts are fully and clearly sufficient while in the affidavit of merits only conclusions are set forth. Since the affidavit failed to state sufficient facts to show a surrender, the other matter set up in the affidavit becomes immaterial. Since the trial court held the affidavit insufficient it was entirely proper to set aside the order opening up the judgment, and there is no merit in any of the other points urged by the defendant.

Complaint is made that the order entered opening up the judgment was made by Judge Wells, while the order striking the affidavit and vacating the order entered by Judge Wells was entered by Judge Williams. It is pointed out that this was in violation of the rules of the Municipal Court. The rules are in no way before us in the record, and it has been repeatedly held that this court does not take judicial notice of the rules of the Municipal Court of Chicago. But in any event we think the matter was properly before Judge Williams and there is no merit in the contention.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, J.J., CONCUR.

Opinion filed May 17, 1922.

27 - 26958

FRANK SCHUETZ,

Defendant in Error,

v.

FRANK J. WERLE, doing business as WINCHELL PRESS and CHICAGO ENGRAVING COMPANY,

Plaintiffs in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against the defendant to recover one Dexter folding machine valued at $425.00. The sheriff, under the writ, took the machine from the defendant and delivered it to the plaintiff. Upon a trial of the case the court directed the jury to find a verdict in favor of the plaintiff, which was accordingly done, to reverse which this writ of error is prosecuted.

The evidence offered on behalf of plaintiff tended to show that on July 20 or 21, 1914, the sheriff, under an execution issued in another case, sold certain personal property to divers persons, and at that sale sold the Dexter folder to plaintiff for $425.00. This appears from the sheriff's return of the execution. At the same time the sheriff gave what is termed a bill of sale or receipt to plaintiff for the $425.00. The evidence further tends to show that immediately thereafter plaintiff got a wagon or moving van to remove the folding machine, which apparently was in the possession of the defendant, but the defendant

refused to give it up; that on the next day plaintiff served a written demand on defendant demanding the folder, which demand was refused; that on the 4th of August following, the present replevin suit was brought. One witness testified on behalf of plaintiff. In addition to his testimony the execution, bill of sale or receipt, and the written demand above mentioned were received in evidence. Thereupon defendant called plaintiff as his witness, and after some preliminary questions, plaintiff was asked by counsel for defendant: "Did you on the 4th day of August - were you on the 4th day of August, 1914, the owner of the Dexter folder described herein?" Objection was sustained to this question. Thereupon defendant's counsel asked: "Were you on that day entitled to the Dexter folder described in this affidavit for replevin?" Objection was sustained to this question also. Counsel then stated to the court that he wanted to show that plaintiff at the time suit was brought was not the owner of the property and was not entitled to its possession. The court, however, refused to permit the above question to be answered. Afterwards the plaintiff was asked if he served notice on defendant demanding possession of the folder, to which objection was sustained. The witness was further asked if he ever paid the sheriff of Cook County $425.00 for the folder. The witness answered, "I did not." Objection was made and sustained and the answer stricken out, the court holding that the return of the sheriff on the execution could not be attacked in this manner.

Counsel for the defendant contends that he was not permitted to make any defense to the case; that he did not have a fair trial, or any trial at all; that "there was not

a scintilla of evidence in this case that on the 4th day of August, 1914, Frank Schmetz was the owner or entitled to the possession of the property described in the affidavit for replevin." We think this contention cannot be sustained. The uncontradicted evidence was that plaintiff had bought the folder at the sheriff's sale and paid the sheriff for it on the 20th or 21st of July, 1914, and that immediately after the sale he endeavored to get possession of it from the defendant, but that the defendant refused to deliver it up; that afterwards, on the next day, he served a written demand for the machine on the defendant; that on the 4th of August following, about fifteen days after serving the demand, this suit was brought. This evidence was clearly sufficient, in the absence of anything to the contrary, to show that plaintiff was the owner and entitled to the possession of the folder on August 4, the date the suit was brought.

We think the court should have permitted the defendant to ask the questions propounded to the plaintiff, as above set forth, although some of the questions called merely for conclusions of the witness, viz: as to whether plaintiff was the owner or entitled to the possession of the folder, which were ultimate questions to be decided. Yet we think it would have been better if the court had granted some latitude to the defendant in this regard. We have examined the record carefully and can find no evidence or offer of evidence that would indicate that the suit would result in any different judgment if there was a re-trial. When the court sustained objections to the questions above set out, counsel for defendant stated that he expected to show that when this suit was brought, the

plaintiff was not the owner or entitled to the possession of the folder, but how or by what evidence he expected to establish this he did not state. If defendant, as a matter of fact, had a good defense to the plaintiff's claim he was extremely secretive about the nature of it, and in the absence of a more specific offer of proof a reversal of the judgment would not be warranted. It appears that plaintiff bought this machine at a sheriff's sale and was clearly entitled to it and there is no offer of evidence or argument tending to show that plaintiff was not the owner or entitled to possession, or that the defendant had any claim whatever to the property. In these circumstances we think he would not be warranted in reversing the judgment so that a better record might be made. And although it is clear that defendant was hampered in his endeavor to make a defense, we are of the opinion, upon a consideration of all the facts, that the judgment should not be reversed.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

Opinion filed May 17, 1922.

37 - 26976

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. ANNA SILLS,
Defendant in Error,

v.

MIKE STANLEY,
Plaintiff in Error.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

This was a proceeding brought under the bastardy act whereby Mike Stanley was charged with being the father of the bastard child of Anna Sills, the relatrix, an unmarried woman. At the close of all the evidence there was a directed verdict finding that the defendant was the father of such child, and he was condemned to pay $1100.00 for the support, maintenance and education of the child in accordance with the provisions of the statute, to reverse which defendant has sued out this writ of error.

The record discloses that on October 15, 1920, by leave of court, a complaint was filed against the defendant wherein it was averred that Anna Sills, an unmarried woman, was pregnant with child, which would, by law, be deemed a bastard, and that the defendant was the father of such child. The next day a warrant was issued and on the following day the defendant was arrested. On January 17, 1921, the case was called for trial. All parties appeared in court, the defendant in person as well as by counsel. Thereupon on motion of the People the trial of the case was postponed until February

Opinion filed May 17, 1932.

16, 1921. The defendant was taken into custody for failure to give bail. The exact date, however, does not appear, and afterwards on February 8, he was released upon giving bail. On February 16 when the case was called for trial the second time all parties were present, and the defendant appeared in person as well as by counsel, and upon his motion the trial was postponed until February 23, 1921. On the last mentioned date an amended complaint was filed setting up, inter alia that the child was born February 3, 1921. When the case was called for trial the third time on February 23, 1921, the defendant again appeared in person as well as by counsel. Counsel, however, was not defendant's attorney of record, the latter being then engaged in the trial of a case in the federal court. A motion was made on behalf of defendant that the trial be continued for ten days when the defendant's counsel would be released from the trial in the federal court. The motion was denied, and a petition for change of venue was then presented on the ground that the judge was prejudiced. The change of venue was denied and the case proceeded to trial. A jury was selected and evidence was introduced during the forenoon of February 23. The trial not being completed in the forenoon the court adjourned until 2:30 o'clock in the afternoon. The court convened at 2:30 and the State completed the presentation of its evidence. The attorney who appeared with defendant objected to proceeding with the case, and stated that he did not represent defendant and knew nothing about the facts in the case; that he had no connection with the attorney for defendant but had been requested by him to attend court and request that the case be continued. It further appears from the record, however, that the attorney who appeared with defendant on that day cross-examined the witnesses produced by the

People and took an active part in the trial of the case on behalf of defendant. When the People had closed its case counsel who appeared with defendant again stated that he had no witnesses nor any evidence to offer on behalf of defendant, as he knew nothing about the case. Thereupon it was discovered by the court that the defendant was not in court, and it appears that sometime during the morning session, after the motions for continuance and for a change of venue had been denied, the defendant disappeared and has not since been apprehended. When this was discovered, there being no evidence to be offered on behalf of defendant, the court directed the jury to return a verdict finding that defendant was the father of the child which was accordingly signed. Thereupon the court called the defendant and his surety, and neither of them appearing, a default was entered and the bond forfeited. The court entered judgment on the verdict and defendant was condemned to pay in installments the sum of $1100.00 for the support and maintenance of the child.

The defendant in his statement of the case in his printed argument states that for some days previous to the date of the trial Mr. Francis Borrelli, who was the attorney of record for defendant, had been actually engaged in the trial of a case in the District Court of the United States and was still so engaged at the time the case was called for trial February 23, 1921, and that "he was unable to appear before Judge Fisher because of this engagement, and requested Attorney Rush B. Johnson to appear before him and acquaint Judge Fisher with the fact of his actual engagement and ask for a continuance of ten days, at which time he would have finished the case he was trying and proceed with the trial of this case."

The statement further is that Attorney Johnson appeared before Judge Fisher and informed him of Mr. Borelli's engagement "and asked for a ten days' continuance" and that when this was denied Mr. Johnson asked that the case be continued until two o'clock in the afternoon of that day so as to enable the defendant to get another counsel, which motion was also denied.

It is first contended that the court erred in denying defendant's motion for a change of venue, and it is argued that since the petition for the change of venue was in proper form it was imperative that the court grant the prayer of the petition and change the venue of the case, and that since this was not done it was error to proceed with the trial. Of course, it is the law that where a petition for a change of venue is in proper form it is the duty of the trial judge to grant the prayer of the petition and that he has no discretion in the matter. But we think it clearly appears from the statement of counsel in his printed argument that the purpose of Attorney Johnson in appearing before Judge Fisher was to obtain a continuance of ten days until Mr. Borelli would have finished the trial of the case in the federal court. Indeed, this is what counsel for defendant state. This being true it appears that the petition for a change of venue was a mere subterfuge to gain a continuance which could not otherwise be obtained. In these circumstances we think it was not error to deny the change of venue. Moreover, no notice was served on the State's Attorney that the motion for a change of venue would be made, as provided for by the statute. Section 5, Ch. 146, Cahill's Statutes. And this want of notice was not waived although

the State's Attorney was present in open court. Miller v. Pence, 132 Ill. 148. We think the court was warranted in denying the motion for a change of venue under the facts as disclosed by the record.

It is further contended that there was an abuse of judicial discretion by the trial judge in refusing to continue the case when it appeared without contradiction that defendant's counsel of record was actually engaged in the trial of a case before another court. The record discloses that there were at least two continuances of the case, and on February 16, 1921, when the case was continued at the request of the defendant to February 23, 1921, the trial judge expressly stated to counsel for the defendant that if counsel was still engaged in the trial of the case in the federal court on February 23, he would not grant him any further continuance but that the defendant should obtain other counsel. Of course, the case could not be continued indefinitely on engagement of counsel. The matter involved was simple. Any attorney of ordinary ability could in a few days prepare and try defendant's case. And since it appears that the court expressly stated on February 16 that the case would not be continued beyond February 23, and since there was no apparent reason why on February 16 it could not reasonably be ascertained that counsel would still be engaged in the federal court, it then became the duty of the defendant to arrange for other counsel in ample time to have his case properly presented on February 23. This defendant failed to do, and upon a careful consideration of the record we cannot say that the court was not acting within his judicial discretion in denying a further continuance.

the TAFT'S ATTITUDE WAS STRONG IN THE CASE. Gitlow v. People, 238 NY, 343. In light the state was attempting to execute the notion for a change of venue upon the issue as claimed by the court.

It is further stipulated that 18-U- was of state of Illinois directed to the trial judge in refusing to grant the use was also a clearer action constitutes the defendant's motion of jurisdiction upon in the trial of a case involve another right. The trial dismissed that there was no jurisdiction at the time, and on February 22, 1921, when the case was initiated at the request of the defendant in February 22, 1921, the trial judge respectively stated to counsel for the defendant that if counsel was still engaged in the trial of the case in the federal court on February 23, he would not grant the motion continuance for that the defendant should be held after counsel. Of course, the case still is in dispute insofar as disposition of counsel. The right involved was single. The attorney of counsel affirmed which is a the type process and by authority cited. The above it appears that the trial judge refuse to grant any if that the case still be prejudiced because counsel AT, the right that was in progress change and is further it of trial not promptly to authorized and counsel which will be engaged in the federal court. It also appear the judge of the defendant is because the right engaged in which that is here his case prejudicial to defendant. AS. This statement that is of, because a matter counsel action of the result in counsel and that the court was not asking which the judicial discretion is abuse - further continuance.

It is next contended that the court was in error in directing the jury to find that the defendant was the father of the child. In support of this it is argued that section 4, ch. 37, R.S. provides that where a person is charged, as in the instant case, the court shall cause an issue to be made up whether the person charged is the real father of the child, and that such issue shall be tried by a jury; that since a bastardy proceeding is quasi-criminal in its nature, and since section 12, ch. 171, Cahill's Statutes, provides that no person shall be imprisoned for non-payment of a fine or judgment in civil, criminal, quasi-criminal, or qui tam actions except upon conviction by a jury, it was error to give this instruction directing the verdict. We think the point is untenable, and whether the section last referred to was pertinent to the case, it may be said that since the filing of the briefs in this case the Supreme Court of this State has declared that section of the statute unconstitutional. Sturges Burn Mfg. Co. v. Pastel, 301 Ill. 253. Prosecutions under the bastardy act are civil and not criminal, although criminal in form. Scharf v. People, 134 Ill. 240. Such proceeding is not designed as a punishment of the defendant, but is for the purpose of providing support and maintenance for the child to prevent it from becoming a public charge. People v. Ciemeniecki, 221 Ill. App. 275. Such proceedings being civil in their nature, the jury decide only questions of fact, and questions of law are for the determination of the court.

In the case of a motion for a directed verdict the question is one of law and is properly addressed to the

It is much questioned that the mere use of a river in diversions can ever be that that the riparian may by labour of his hands. In support of this it is argued that section 2, ch. 27, R.S. provides that where a person is drowned, or in the instant case, the owner shall cause issue to be made up another the person charged the real value of the water, and that with issue shall be held to be a bar that alone a healthy procedure is semi-criminal in its nature, and cross matter is, ch. 271, Smith's criminal, provides that no person shall be imprisoned for non-payment of a fine or judgment in civil, criminal, quasi-criminal, or not has action accrue upon contracts by a jury, is was error to give this instruction (contrary to verdict). He takes the point it unlawful, and whether the action last relative to was performed in the area, it was be said that where the taking of the water in this case has appear clear at just view the evidence that amount of the statute unconstitutional. Cannon Dam Co. v. Dunbar, 301 Ill. 220. Prescriptions under the Statute and are civil and not criminal, although criminal in form. Dunbar v. Pantle, 248 Ill. 200. Cases proceeding in rem instituted as a punishment of the defendant, but in for the purpose of enabling injured parties, however, to obtain to prevent it from running a public river. Ingle v. Jamieson, 208 Ill. 167. 172. Pure proceedings being civil in their nature, the jury decide only questions of fact, and questions of law are for the determination of the court.

In the case of a mistake for a criminal conviction the question in one of law and is properly submitted to the

court, which may direct a verdict for either party. A verdict for the plaintiff may be directed if a cause of action has been legally established and no defense appears. People v. Zurek, 277 Ill. 621. Since there was no dispute in the evidence, and since no reasonable conclusion could be drawn therefrom except that the defendant was the father of the child, the court properly directed the verdict. There was no question of fact to be determined by the jury.

It is further contended that the judgment is fatally defective because the record shows that no issue was made up as required by the statute and, therefore, there was nothing before the court upon which a trial could properly be had. We think this is a misapprehension of the state of the record. The record discloses that the matter came on for hearing, the People being represented by the State's Attorney, and the defendant in his own proper person as well as by counsel, "and now issue being joined herein" it was ordered that a jury come, etc. Formal pleadings are not required in bastardy proceedings, and since the record states that the issues were made up, we think the point made is not well taken, and that the court did not err in proceeding with the trial. Moreover, whatever error, if any, there may be in the record, we think the defendant is in no position to complain, because it appeared that during the progress of the trial he disappeared from the court room and has not since appeared or been apprehended. In these circumstances we think the court properly entered judgment on the verdict.

The judgment of the Municipal Court of Chicago is affirmed. AFFIRMED.

[illegible] and MAYNARD, JJ., concur.

Opinion filed May 17, 1922.

64-27013

A. J. CARON, doing business as the Aard Glass Company, Appellant,

-vs-

UNITED STATES BREWING COMPANY OF CHICAGO, a corporation, Appellee.

Appeal from Municipal Court of Chicago.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

225 I.A. 656

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of the failure of the defendant to deliver to plaintiff certain mirrors which the plaintiff had purchased. The case was tried before the court and there was a finding and judgment in plaintiff's favor for $198.76. Plaintiff being dissatisfied with the amount of the judgment prosecutes this appeal and contends that under the evidence he was entitled to recover $3914.50, and asks this court to enter judgment in his favor for that amount here.

The record discloses that plaintiff in his original statement of claim was seeking to recover $3813.22, and by the amended statement of claim, $3592.44. It was plaintiff's contention that he purchased from the defendant certain second-hand mirrors for a specified price; that at the time of the purchase he paid $1000.00 on account; that only a small portion of the mirrors were delivered to him, and that the defendant refused to deliver the balance, as a result of which plaintiff sustained damages, the amount of the damages being the difference between the purchase price and the market price.

The judgment entered was for the balance of the $1000.00 paid by plaintiff after deduction had been made for the mirrors delivered. A number of points are made and argued by both sides, all of which have been carefully considered, but in the view we take of the case it will be necessary to discuss but one.

We think plaintiff has failed to prove that he was damaged, even if we assume, as we do for the purpose of this decision, that he proved every other contention made by him. Plaintiff offered evidence tending to show that the mirrors were of two sizes; that for the large sizes he agreed to pay 72¢ per square foot, and for the smaller sizes 50¢ per square foot. He further offered evidence tending to establish the number of square feet of each size. To prove the amount of his damages plaintiff offered three witnesses, Samuel Cohn, A. J. Caron and W. V. Hart. Samuel Cohn testified that the fair, reasonable, cash market value of similar mirrors at the time in question was $2.20 per square foot. Caron placed the value at from $2.00 to $2.50, and Hart from $1.50 to over $2.00 per square foot. These were all the witnesses that testified on that subject. Cohn was an employee of the plaintiff, Caron, and on cross-examination he testified that he had been in the business of handling mirrors for about 15 years; that he had made the contract in question between the parties; that he made a number of similar purchases about the time that he purchased the mirrors in question, probably making a deal about once a month. He further testified that at the time he purchased the mirrors in question, and for which plaintiff was to pay 72¢ per square foot, their market value was $2.20 per square

foot; that he made five or six other purchases during the month of October, 1919, the time in question, from other parties of similar mirrors for which he paid from 70¢ to 72¢ per square foot. A. J. Caron, the plaintiff, after testifying that the reasonable market price in October, 1919, was $2.00 to $2.20 per square foot for similar mirrors, testified that he made other purchases in October, 1919, for 72¢ per square foot.

From the foregoing it clearly appears, without contradiction, from the testimony of plaintiff's witnesses, that plaintiff was buying similar mirrors in the open market from other parties, at the time he bought the mirrors in question, at a price of 70¢ to 72¢ per square foot, several of such purchases being made. In these circumstances, of course, the market price of such mirrors would be from 70¢ to 72¢ per square foot and not from $2.00 to $2.20 per square foot as plaintiff and his witnesses testified. There is nothing in the record that in any way would indicate that these purchases made by the plaintiff from other parties were not made in the usual and ordinary course of business in the open market. It appears, therefore, that plaintiff was in no way damaged by the action of the defendant in refusing to deliver the balance of the mirrors to him. It follows from this that the trial judge was justified in entering judgment for $198.75, the balance of the $1000.00 remaining in defendant's hands, and the judgment must, therefore, be affirmed.

AFFIRMED.

THOMSON and TAYLOR, JJ. concur.

27226 Opinion filed May 17, 1922. 27126

78-27026

JERRY VITEK, Appellee,	)	Appeal from
-vs-	)	Circuit Court,
JACQUES TCHELEBIAN, Appellant.	)	Cook County.

225 I.A. 658

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages for personal injuries. There was a verdict and judgment in his favor for $3681.00. to reverse which defendant prosecutes this appeal.

The record discloses that on February 11, 1917, at about one o'clock in the afternoon, plaintiff was driving east on 46th Street. He drove a horse to an open wagon and had been delivering milk, butter and eggs. He turned the horse south to drive into a north and south alley and as the horse was proceeding into the alley a seven passenger limousine automobile, driven by a servant of the defendant, struck the right hind wheel of plaintiff's wagon, threw plaintiff off the seat onto the ground and he was severely and permanently injured.

There is no complaint that the judgment is excessive, nor is any complaint made as to the ruling of the court in the admission or exclusion of evidence, nor as to the instructions given. The only contention is that the evidence shows that the defendant was not guilty of any negligence in the driving of the automobile, but that it appeared from the evidence that plaintiff was injured as a result of his own negligence; that both vehicles were traveling east and that plaintiff suddenly and without warning turned his horse to the south in the pathway of the automobile and that it was impossible for

Opinion filed May 17, 1982.

defendant to prevent the collision.

The evidence shows that on the day in question the weather was extremely cold and the street was icy and slippery; that it was a bright clear day and that there were no other vehicles in the street except the two here involved; that in the automobile at the time in question there were five persons besides the driver and that they were returning from a funeral. The persons in the automobile besides the chauffeur were Mrs. Edward Tiefenthal, her husband, Mrs. Joseph Rosenzweig, an aunt of the latter, and a small boy. The evidence tends to show that as a result of the collision plaintiff was thrown off the seat of the milk wagon onto the pavement and rendered unconscious; that the automobile stopped and the ladies got out and subsequently boarded a street car and went home. The men put plaintiff in the automobile to take him to a hospital but after they drove a block or two plaintiff insisted on getting out of the automobile and going home, stating that he was not injured. Thereupon he alighted from the automobile and the driver drove home. Shortly afterward plaintiff's neighbor found him wandering in the street apparently unaware of his condition. The neighbor took him home and he was confined to his bed for a considerable period of time.

Plaintiff testified that the day in question was very cold; that he was driving an open wagon with a high seat in front; that he had on an overcoat and a cap over his ears; that he was driving in the south or east-bound car track, there being two car tracks in the street; that when he approached the alley which was in the rear of his home, he turned to the south but did not look behind to see if any

vehicle was approaching from that direction; that he had no recollection of any collision or accident, but the first he recalled was that he was home in bed some time afterwards. From his testimony it appears that he was somewhat dazed and did not recall the facts of the case.

Joseph J. Lamberskey, a witness for plaintiff, testified that at the time in question he lived and conducted a store on the south side of 26th street and immediately east of the alley, and that he saw the accident; that he lived upstairs and conducted the store on the first floor; that it was Sunday and that his store was closed, but that he was arranging some of his goods in the show window. He further testified that he was neighbor of plaintiff and knew him for eight or nine years; that plaintiff was driving east on 26th Street in the south street car track, the horse going at a trot or fast walk; that before turning into the alley plaintiff looked back from both sides of the wagon to see if anything was approaching; that by the time the horse and wagon were half-way into the alley the automobile came east at that rate of about 35 miles per hour and struck the right hind wheel of the wagon, throwing the wagon over against a telephone pole located at the east side of the alley on the south side of 26th Street; that the hind wheel of the wagon was broken, plaintiff thrown to the ground, and the butter, eggs and milk scattered; that he left his store and went out into the street to see what had happened; that the automobile stopped and two or three men got out, put plaintiff in the machine and said they were going to a hospital; that after plaintiff fell he remained lying on the ground and appeared to be unconscious; that he did not see any women get out of the automobile. He

further testified that the automobile had skid chains on and that he saw from the marks on the ice on the street that it had skidded a distance of about 75 feet along the south side and over the south curb of 26th Street; that the alley in question was midway between South Springfield Avenue on the east and Harding Avenue on the west, both north and south streets.

For the defendant Mrs. Tiefenthal testified that they were returning from a funeral; that she knew there was an accident on 26th Street because the automobile hit something and stopped; that she immediately got out and saw that a man was injured; that she and the other ladies got into a passing street car and went home; that the automobile seemed to stop immediately when it struck the wagon; that she did not know whether the automobile was running fast or not; that she paid no particular attention to that matter. Mrs. Rosenzweig testified that the first thing she knew the automobile hit a wagon; that she had been talking to some of the other ladies; that the wagon turned over and the man was thrown from the seat; that she did not remember what part of the wagon the automobile struck; that after the collision the wagon was partly in the alley and partly in the street, the exact location of which she could not give. She did not recall whether the automobile was going fast or slow. Harry Aktarian, the chauffeur, testified for the defendant that he drove the automobile in question; that he had been driving in Chicago since 1910; that at the time in question he was returning from a cemetery; that he turned into 26th Street at Crawford Avenue, which is one block west of Harding Avenue; that he was driving on the south side of the street south of the street car tracks; that he first saw the milk wagon when it was

about a block ahead of him; that it was then driving on the north side of the street car tracks; that the witness was driving his machine at about 10 or 12 miles per hour; that when the automobile was about five feet west of the alley plaintiff swung his horse directly in the path of the automobile; that the witness immediately sounded his horn and applied the brakes, but that it was too late to avoid the collision and that the automobile struck the wagon and pushed it over against a telephone pole at the corner of the alley and the south side of the street; that the witness in an endeavor to avoid a collision turned his machine sharply to the south and thought he could avoid a collision by running south in the alley but that it was too narrow; that he immediately stopped the automobile, got out, put the men in the automobile to take him to a hospital, and that the ladies left and went home; that it was impossible for the witness to avoid the collision on account of the plaintiff turning without warning in the path of the machine, and that after the accident he drove his machine off the south street car track to permit a street car to pass. This is substantially all the material evidence in the case.

Plaintiff's position is that the evidence shows that the automobile was driven south in Harding Avenue at a rapid rate of speed and turned east in 26th Street, but on account of the speed it ran over the south curb before the driver could make the turn, and in this way struck the wagon as it was going into the alley. This is not borne out by the evidence. There is not a word of evidence in the record as to whether the automobile came from the north or the south into 26th Street, and there is no evidence that it turned east on 26th

Street at Harding Avenue. The only witness who touched on this question was the chauffeur. He testified that he was coming from a cemetery; that "on 56th I turned, on Crawford I turned on 56th, I was going on 56th right in my way on the south side of the street car line." While the evidence does not show the exact distance between Harding Avenue and Crawford Avenue, we think it sufficiently appears that Crawford Avenue is a north and south street and one block west of Harding Avenue. If the automobile turned into 56th Street at Crawford, as the driver testified, the accident did not occur in the manner plaintiff contends. However, we do not believe that all reasonable minds would reach the conclusion that the accident would not have happened except for the fact that plaintiff turned sharply and without warning, in the path of the automobile, and in these circumstances it was a question of fact for the determination of the jury. Libby, McNeil & Libby vs. Cook, 222 Ill. 206. The evidence tends to show that the automobile struck the hind wheel of the wagon when the horse and part of the wagon were in the alley. This being true, the horse and wagon could not have turned sharply in front of the path of the automobile as defendant contends, but it must have turned when the automobile was a considerable distance from the wagon. In these circumstances we think the question was a proper one for the jury.

It follows, therefore, that the judgment of the Circuit Court of Cook County must be affirmed.

AFFIRMED.

THOMSON and TAYLOR, JJ. concur.

Opinion filed May 17, 1922.

259 - 26433

BELL & HOWELL COMPANY, a corp.,
Appellant,

v.

GEORGE K. SPOOR,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The cause was consolidated with Bell and Howell Company v. Spoor, General Number 26432 for hearing. We have announced our opinion in General Number 26432, and therein set forth the facts and the law which in our judgment was applicable.

The trial judge, in the instant case, found that the plaintiff was entitled to recover royalties up to October 15, 1917, the date of the alleged assignment, amounting to $6416.67 and interest and entered judgment therefor. That was done apparently on the theory that the contract of May 1, 1915, was binding, but only up to October 15, 1917. For the reasons, however, which we have set forth in our opinion in Bell and Howell v. Spoor, General Number 26432, the trial judge erred, and the above mentioned judgment must be modified. Judgment will be entered here, in the instant case, in favor of Bell and Howell Company and against Spoor, for the three installments of royalties, due October 31, 1917, January 31 and April 30, 1918, being $21,000.00 plus interest at five

per cent from June 30, 1918, to date, in all $25,674.58, together with costs.

JUDGMENT MODIFIED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

7

309 - 26483

Opinion filed May 17, 1922.

BELL AND HOWELL COMPANY,

Appellee,

v.

GEORGE K. SPOOR,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

In this cause the plaintiff, Bell and Howell Company, brought suit in the Municipal Court to recover an installment of royalty in the sum of $7,000.00, which it is claimed became due on July 31, 1917.

The trial judge held that the adjudication in Bell and Howell Company v. Spoor, 216 Ill. App. 221, "conclusively adjudged and determined that the contract sued on in this case was entered into between the plaintiff and the defendant for an adequate consideration; that the defendant, George K. Spoor, is estopped by the judgment and records in the said former suit from showing a want of consideration for said contract," that Spoor was estopped from showing that the patents or applications were void or invalid, or infringed the Schneider or any other patent, and entered judgment in the sum of $8020.83 in favor of the plaintiff. This appeal is therefrom.

All the contentions made by counsel for the defendant we have already considered in Bell and Howell Company v.

Hesser, General Number 26432. What we have stated there is decisive of this case. The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

Opinion filed May 17, 1922.

310 - 26484

BELL AND HOWELL COMPANY,
a corp.,
Appellee,

v.

GEORGE K. SPOOR,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

In this cause the plaintiff, Bell and Howell Company, brought suit in the Municipal Court to recover an installment of royalty in the sum of $7,000.00, which it is claimed became due on April 30, 1917.

The trial judge held that the adjudication in Bell and Howell Company v. Spoor, 216 Ill. App. 521, "conclusively adjudged and determined that the contract sued on in this case was entered into between the plaintiff and the defendant for an adequate consideration; that the defendant, George K. Spoor, is estopped by the judgment and records in the said former suit from showing a want of consideration for said contract", that Spoor was estopped from showing that the patents or applications were void or invalid, or infringed the Schneider or any other patent, and entered judgment in the sum of $8137.50 in favor of the plaintiff. This appeal is therefrom.

All the contentions made by counsel for the defend-

Opinion filed May 17, 1922.

Jim - Zebis

Error and action dismissed.

Mr. Justice E. Smith.

Mr. Justice Duff dissented in relation to the costs.

ant, we have already considered in Bell and Howell Company v. Spoor, General Number 26432. What we have stated there is decisive of this case. The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND PEARSON, J. CONCUR.

Opinion filed May 17, 1922.

270 - 26931

OSMUND VINJE, et al, Appellee,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
JOSEPH SARLEY, et al, On appeal of Walter Fagles, Appellant.	)	

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 9, 1919, the Vinjes, as complainants, filed a bill in the Superior Court to foreclose a chattel mortgage against the defendants.

The Sarleys, defendants, having given a chattel mortgage to the complainants, Vinjes, to secure $1300.00 of notes, and having made default, this bill to foreclose was filed. The chancellor decreed a foreclosure.

The chattel mortgage which it is here sought to foreclose was involved and considered by this court in Vinje v. Fagles, (General Number 25912). We there said, "On Wednesday, December 17, 1919, the property described in the chattel mortgage, given by the Sarleys, which included the leasehold interest of the mortgagors in the premises * * * was sold at public sale and bought in by Osmund and Vivin Vinje," etc., and decided that the Vinjes, by purchasing at the mortgage sale, became entitled to obtain possession of the premises in a forcible detainer proceeding.

The power of sale in the mortgage having been exercised the question then arises, what ground is there now for a foreclosure? A bill to foreclose does not lie unless there is property to be sequestered and sold to liquidate a debt. Here, the Vinjes have exercised the power in the mortgage, have sold all the property it described, and themselves have become the purchasers and got such title to the leasehold interest that we held they were entitled to obtain possession in a forcible detainer suit.

As there are now no property rights left, which it is the particular function of a court of equity to take charge of, in order to assist in the liquidation of the indebtedness, there is no equitable jurisdiction available, and the creditor is restricted and relegated to his action at law. In other words, there is no right to a foreclosure in equity where there exists only a debt for which there is an adequate remedy at law.

When the mortgagee in a chattel mortgage by reason of the default of the mortgagor exercises legally his right and power to sell, and a sale is made and the title passes, that instrument, then, as a mortgage, is <u>functus officio</u>, and will not support a suit to foreclose.

It was argued in the former case (Gen. No. 25912) on behalf of the Vinjes, for the purpose of establishing the right to an action for forcible detainer, that the sale of December 1919, gave them title to all the property described in the mortgage, and now, here, it is argued for them, that they should be allowed the aid of a court of equity to sequester for them that which they have admitted and urged, already be-

longs to them. The two positions are irreconcilable.

Of course, what is said in Vansant v. Allen, 23 Ill. 30, is true, that "a creditor by note and mortgage has several remedies, either and all of which he may pursue until his debt is satisified", that

> "He may bring his action upon the note; or put himself in possession of the rents and profits by an ejectment after condition broken, or, if the mortgage be recorded, proceed by scire facias on the record and obtain a judgment to sell the land; or he may file his bill in chancery for a strict foreclosure of the equity of redemption, which courts will allow under a proper state of circumstances, or file a bill for foreclosure and sale, which is the usual practice in this state." That, "If the creditor obtains judgment on the note, a sale of the land under the execution is a sale only of the equity of redemption, and the money raised by the sale is satisfaction of the mortgage pro tanto, and he may have ejectment against the purchaser upon the mortgage, if he does not himself become the purchaser if the mortgage is not fully satisfied." That, "A judgment on the note, without satisfaction, is no bar to a proceeding in equity to foreclose, and the two suits may be pending at the same time."

Here, however, in the instant case the mortgage, qua mortgage, was already exhausted and the property all sold, and actually purchased by the Vinjes themselves.

We are of the opinion that the chancellor erred in taking jurisdiction of the bill to foreclose and entering a decree of foreclosure. The decree will be reversed and the bill dismissed for want of equity.

DECREE REVERSED AND SUIT DISMISSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

Opinion filed May 17, 1922.

83 - 27033

EURADELLE DAWSON, Defendant in Error, v. EDDIE WILLIAMS, Plaintiff in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

225 I.A. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 29, 1919, the plaintiff, Euradelle Dawson, filed a praecipe in the office of the clerk of the Superior court requesting the issuance of a summons in an action on the case against Eddie Williams (the defendant) and one Peter M. Klein, returnable to the October term, A. D. 1919.

On the same day, a summons was issued and directed to the Sheriff of Cook County commanding him to summon Williams and Klein to appear before the Superior court on the first day of the term which began the first Monday of October, A.D. 1919.

The summons was duly served by the sheriff on the defendant, Eddie Williams on September 1, 1919, both by reading and delivering a copy to him. The return as to Klein was "Not found in my County."

On January 15, 1921, the plaintiff, Euradelle Dawson, through her attorney filed a declaration alleging that while a passenger in a taxicab and being carried for hire to her destination, she was injured through the negligent driving of Williams. The ad damnum was $5,000.00.

On motion of the plaintiff, on March 23, 1921, it appearing to the court that due personal service had been had on the defendant, Williams, for at least ten days before the first day of the term, the default of Williams was entered of record. That order recited "wherefore the plaintiff ought to have and recover of and from the defendant, Eddie Williams, her damages sustained herein by reason of the premises."

On May 9, 1921, on motion of the plaintiff's attorney, it was ordered that all papers and proceedings in the cause be amended by discontinuing without costs as to the defendant Klein. And on the same day the assessment of the plaintiff's damages was referred to a jury and a verdict rendered as follows: "We the jury find the defendant guilty and assess the plaintiff's damages at the sum of twenty-five thousand dollars." Upon that verdict judgment in the sum of $2500.00 was then entered.

On July 16, 1921, the record shows the following: "Now on this day it is ordered that the defendant's motion to vacate and set aside the default and judgment heretofore entered herein and quash the writ of execution issued in said cause be and is hereby overruled and denied, to which the defendant excepts."

The assignment of errors by counsel for the defendant is as follows:- (1) The court erred in entering the order of March 22, 1921, which undertook to put the defendant, Williams, in default, and in ordering an assessment of the plaintiff's damages. (2) The court erred in entering the order of May 9, 1921, in calling a jury to assess the plaintiff's dam-

ages. (3) The court erred in entering judgment against the defendant, Williams, and (4) the court erred in overruling the defendant's motion to vacate the judgment and set aside the order of default.

It is contended by counsel for the defendant that where a defendant is served with summons ten days before the term of court and no declaration is filed until after the commencement of the next succeeding term it is error to render judgment against the defendant without a rule and service of it on him, to plead; that a defendant in such a case is not in default.

The summons was issued August 29, 1919, and made returnable to the October term of 1919. It was served on the defendant September 1, 1919, which was more than ten days before the October term. No declaration was filed either to the October or November term of 1919.

No declaration was filed until January 15, 1921, more than fifteen months after the October term of 1919, to which the summons was returnable. No appearance or plea was filed on behalf of the defendant at any time. Section 32 of Chapter 110, (Gahill's Statutes, 1921.) provides, substantially, that if a plaintiff does not file his declaration ten days before the term of the court to which the summons is made returnable, the court shall continue the cause; and if the declaration shall not be filed ten days before the second term of the court, the defendant shall be entitled to a judgment as in case of nonsuit.

The plaintiff having filed her declaration fifteen months after the return term, and the defendant having filed neither appearance nor plea, and having made no motion for a non-suit, was he, the plaintiff, without notice to the defendant, entitled to a judgment? The reasoning in the following cases, incline us to the conclusion that he was not. Heedy v. Thomas, 79 Ill. 247; Pratt v. Grimes, 35 Ill. 164; Fish v. Hayes, 46 Ill. App. 428; Smith v. Little, 53 Ill. App. 187; Garnsey v. Schwartz, 154 Ill. App. 154; Rubin v. Haynor, 181 Ill. App. 403; Baumsderfer v. Jermak, 203 Ill. App. 294. According to these cases the court erred in entering the default of the defendant without notice and without a rule to plead. In Pratt v. Grimes, 35 Ill. 164, the court said:

> "Undoubtedly, the right is one which may be waived, but we think a party should, at least, have an opportunity to be heard before he is to be considered as having waived that right.
>
> Eleven days after the declaration was filed, and on the first day of the next term thereafter, a judgment was rendered against the defendant by default, without taking any rule requiring him to plead, and without any notice to him. The record shows no waiver of the defendant's right to have the suit dismissed. We think it was an error in disregarding the condition of the record as it then stood, in entering a judgment by default, without a rule, and service of it, requiring the defendant to plead.
>
> He was not, under the circumstances, in default, and he should have been placed in that situation before a judgment was rendered against him by reason of it. Ordinarily, a party who, without any rule, fails to plead according to the practice of the court, is in default; but a party who is not required to plead cannot justly be said to be in default for not so doing."

The defendant not having waived his right to a judgment as in case of non-suit, and no notice of any motion or rule having been given him, it was error to render a judgment against him by default. His motion to vacate the judgment should have

The plaintiff having filed his declaration fifteen months after the summons issued, and the defendant having filed neither appearance nor plea, and having [illegible] no [illegible], was he, the plaintiff, without notice to the defendant, entitled to a judgment? The authorities in the following cases, incline us to the conclusion that he was not. Smith v. Thomas, 77 Ill. 469; [illegible] v. [illegible], 95 Ill. 308; [illegible] v. [illegible], 48 Ill. App. 486; [illegible] v. [illegible], 57 Ill. App. 487; [illegible] v. [illegible], 166 Ill. App. 194; [illegible] v. [illegible], 203 Ill. App. 649; [illegible] v. [illegible], 225 Ill. App. 204. According to these cases the court erred in entering the default of the defendant without notice and without a rule to plead. In [illegible] v. [illegible], 23 Ill. 480, the court said:

> "Unquestionably, the rights of the party may be waived, but we think a party should, at least, have an opportunity to be heard before he is to be considered as having waived that right.
> Eleven days after the declaration was filed, and on the first day of the term thereafter, a judgment was rendered against the defendant by default, without taking any rule requiring him to plead, and without any notice to him. The [illegible] of the defendant's right to have the rule [illegible], we think it was an error in disregarding the condition of the record as it then stood, in entering a judgment by default, without a rule, and service of it, requiring the defendant to plead.
> He was not, under the circumstances, in default, and he should have been placed in that situation before a judgment was rendered against him by reason of it. Technically, a party who, without any rule, fails to plead something at the [illegible] of the court, is in default; but a party who is not required to plead cannot justly be said to be in default for not so doing."

The defendant had neither waived his right to a judgment as in case of default, and no notice of any motion or rule having been given him, it was error to render a judgment against him by default. The motion to vacate the judgment should have

been allowed. And, further, no rule upon the defendant to plead may be made, if he insists upon his right to a non-suit.

The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON J. AND O'CONNOR, P.J. CONCUR.

27847

Opinion filed May 17, 1922.

JOHN SILBERT, et al,

Appellees,

vs.

Appeal of EMIL A. LIPNER, et al, on LIPNER MOTOR CO., a corporation,

Appellant.

Interlocutory appeal from Circuit Court Cook County.

225 I.A. 657

MR. JUSTICE TAYLOR DELIVERED THE OPINION OF THE COURT.

The complainants, John Silbert, Charles Griskin and A.Henry Goldstein, on December 12,1921,filed a bill of complaint praying for the appointment of a receiver for the defendant, Lipner Motor Company, a corporation. On November 27,1921, the Chancellor, after a hearing upon the bill and answer, and evidence which was introduced, appointed one Jacob Goldman as receiver. This is an interlocutory appeal from that order.

The pleadings, affidavits and evidence introduced show substantially the following:-The defendant, Lipner Motor Company a corporation, with a capital stock of $40,000.00, divided into 800 shares at $50.00 each, on and prior to July 7,1920, was the owner of certain real estate situated at 3836 North Halsted Street, Chicago, which was improved with a brick garage worth approximately from $40,000 to $50,000.00. The only other property owned by the company consisted of some equipment and office furniture worth approximately $1,800.00 and two automobiles worth about $1,900.00. The company was organized October 29,1919, for the purpose of manufacturing, selling and dealing in automobiles, motor vehicles and accessories and to maintain and operate a garage for storage and for repairing automobiles. It does not appear that at any time after its organization the company did any business such as it was organized for. Lipner, who was chief executive and who was supposed to take charge of the automobile business, sold out his stock and left the corporation in the Spring of 1920.

Opinion filed May 17, 1922.

The witness Bremand, who was secretary after October 4, 1920, and familiar with the affairs of the company in the Summer of that year, testified that at that time it was insolvent; that the company owed interest on a first mortgage to the State Bank of Chicago and also owed a second mortgage for $2100.00, and that there were other creditors pressing for payment. On the real estate of the company, which was practically all the property it owned, there were two mortgages; a first mortgage to secure $7000.00 and a second mortgage to secure $2100.00. Suit was brought by one Ethel Mehl, wife of Mehl, the president of the corporation, to foreclose the second mortgage, on the ground that the first installment of interest which came due on January 7,1921,was unpaid.

In the Summer of 1920 the garage was rented by the company to A. Henry Goldstein at $200.00 a month. Upon a default in the payment of the rent, the property was then rented to his father, one Harry Goldstein, at a rental of $100.00 for the first month and $200.00 per month thereafter. The rent under that lease has been paid regularly and is apparently its only source of revenue.

Bremand testified further that at the time the lease to A. Henry Goldstein was made, there was assigned to one Walter Bisbing $10,500.00 of stock and that at that time Bisbing was not an officer of the corporation.

A. Henry Goldstein testified that he rented the garage in the Summer of 1920 for the purpose of putting the garage back on its feet; that he was there about three weeks when he became ill; that they then cancelled his lease and made a new lease; to his father; that at the time of the original lease to him he assigned $10,500.00 worth of stock in the company to Bisbing, an officer of the corporation, as collateral security for the payment of the rent; that he has offered to pay the $600.00 which he owes under the first lease if the stock is returned to him. He further testiiied

The winter season, the was monthly after January 4, 1940, and Cheshire city the efforts of the company in the summer of this year, installed and at that time it was in-stalled; that the company had insured on a later mortgage in the sum of $8,000 and also had a second mortgage for $1500, and that Mary Ann -that LIGHTER payment for payment. At the end of the company, which was the property at cause, there was the principally all the property it cause, there was the mortgage; a first mortgage to Mary Ann [illegible] a second mortgage to Laura Lighter. Mary Ann brought in the Mary Ann bank, this at [illegible], the property at the mortgagee. In [illegible] the second mortgage, on the Lighter that the first institution of [illegible] which was the property 4,1941, was empty.

In the manner of 1940 the people who owned by the company to A. Mary Guisinia at $500.00 a month. Upon a [illegible] in the payment of the rent, the property was then rented to the Lighter, one Mary Guisinia, at a rental of $100.00 for the first month and $100.00 thereafter. The rent under that lease was been paid regularly and is apparently its only arrear of rentes.

Brownie testified further that at all time the lease to A. Mary Guisinia was made, there was nothing to the water bill $20,000.00 of stock and that at that time Mary was not an officer of the corporation.

A. Mary Guisinia testified that at renting the property in the manner of 1940 for the purpose of paying his income back on the lease; that he was there when Brown made the report 111; that they then concluded his lease and made a new lease; to wit trust; that at the time of the original lease he has be entitled $20,000.00 worth of stock in the company to his trust; that at the time of the original lease it was agreed by the $100.00 which he owe under the first affiliated monthly for the payment of the rent; that he engaged to display, an officer of the corporation, an [illegible] lease if he were to rebuked to him. Mr Brunner testified

that Mehl undertook to intimidate the stockholders by telling them he was going to foreclose; that Mehl told Silbert and Bisbing, co-complainants, that unless they gave him their stock for twenty cents on the dollar he would cause the place to become vacant and not let it be rented at that time, and that he, through his attorney, would see that they would lose all their rights by a foreclosure of the second mortgage which he held; that Mehl transferred the mortgage to his wife and that she began suit through her attorney, Branand, who also represented Mr. Mehl.

On the other hand it is the testimony of Bisbing that A. Henry Goldstein assigned the stock in question to him personally in his own right as a consideration for money furnished by him, Bisbing, to A. Henry Goldstein, and that the stock is now in his possession and is his own absolute property.

In the Summer of 1920 when Branand became secretary the corporation was indebted to the Chicago Tribune for over $400.00 which amount was subsequently settled for $280.00; to the Daily News for $200.00, which was subsequently settled for $120.00. The property had been sold for taxes, which taxes were subsequently paid, and amounted, with penalties, to over $700.00. The interest on the first mortgage was $420.00 per year, and which was past due in the Summer of 1920, was subsequently paid. The rent from the present tenant is $2400.00 per year.

In the bill of complaint it was alleged, among other things, "that said Herman F. Mehl and Walter Branand, Jr., are respectively president and secretary of the corporation and have or should have on hand then belonging to said corporation,

that said undertook to intimidate the complainants by telling them he was going to foreclose; that [illegible] and [illegible], co-complainants, [illegible] their [illegible] their shares for twenty cents on the dollar or would cause the place to become vacant and see that it be rented at that time, and that he, through his attorney, would see that they would lose all their rights by a foreclosure of the second mortgage which he held; that said transferred the mortgage to his wife and that she began suit through her attorney, [illegible], who also represented Mr. [illegible];

On the other hand it is in the testimony of [illegible] that A. Henry [illegible] assigned the [illegible] in his personality in his own right as a consideration for money furnished by Mrs. [illegible], to A. Henry [illegible], and that the place is now in his possession and is his own outright property.

In the Summer of 1930 when [illegible] the corporation was indebted to the [illegible] for $1000.00 which amount was subsequently settled for $[illegible]; to the Daily News for $[illegible], which was subsequently settled for $[illegible]. The property had been sold for taxes, which taxes were subsequently paid, and canceled, with penalties, at [illegible]. The interest on the first mortgage was $[illegible] per year, and [illegible] was past due in the amount of [illegible], was subsequently paid. The rent from the present tenant is $[illegible] per year.

In the bill of complaint it was alleged, among other things, "that said [illegible] and [illegible], Jr., were respectively president and secretary of the corporation and both of [illegible] of said corporation,

$4250.00, and that the alleged default upon said interest note is merely a pretended default and is made for the purpose of dissipating the assets of said corporation, and permitting said Herman F. Mehl, through the instrumentality of his wife, to secure complete control of the assets of said corporation, and that there is in fact no default and would be no default upon any indebtedness of said corporation if said Herman F. Mehl and Robert Branand, Jr. would credit to said corporation the money in their hands."

It is further alleged in said bill that although Robert Branand, Jr. is complainant in the foreclosure suit summons was served upon him as secretary of the corporation and "no person is defending said suit."

It is the evidence of Branand who has been secretary of the company since October 4,1920, that in January or February, 1921, an interest coupon in the sum of $75.00 was presented for payment but at that time there were no funds available to pay it and on April 25,1921, a bill was filed to have the mortgage foreclosed.

The question arises, do the circumstances as shown by the plaintiff's affidavits and evidence, justify the appointment of a receiver. Of course, such an appointment as made by the chancellor is tantamount to dissolving the corporation by a decree in equity. It is a general rule that a Court of Chancery may appoint a receiver only where authorized by a statute. There are some exceptions. In Blanchard Bro. and Lino v. Gay Co.,289 Ill. 413, the following language was used; "A stockholder may invoke and set in motion the powers of a court of equity to appoint a receiver where the corporation is fraudulently mismanaged by the officers, whereby it is in

Ibid.,[illegible], and that the criminal defendant may call witnesses who
is entitled a jurisdiction based and is also for the purpose of
establishing the elements of mind intervention, and establishing
will Section 2, [illegible]. Through the constitutionality of the main,
he answer conflicts created as the answer of well intervention,
and this there is is that to account not which is to distinct
upon the transactions of well intervention if said issues 2,
Ibid and Robert Dunham, Jr. which credit to said intervention
the which is their issue.

It is further alleged in this Mile that although
Robert Dunham, Jr. is mentioned in the investigation and
remains not proved upon his is accordingly of the principles
and "the person is entitled well well."

It is the criticism of Dunham who has been working at
the Hennepin Crime Division 1,1973, that is running to [illegible],
that, as indicted notes in the see of 1973,19 not [illegible]
the Dunham [illegible] that view there was no [illegible] is
ped it and as [illegible] 19,1973, a [illegible] to give the
employee investigation.

The [illegible] crime, or the intermediate as [illegible] of the
plaintiff's affidavit and evidence, [illegible] the [illegible]
of a [illegible]. It [illegible], that an [illegible] is made by the
[illegible] is functional to [illegible] the [illegible] of a
[illegible] in [illegible]. It is a [illegible] with that a [illegible] of
Dunham and [illegible] a [illegible] [illegible] [illegible]
a [illegible]. There are some [illegible]. In [illegible] [illegible]
[illegible] v. [illegible], [illegible], the [illegible] [illegible] was [illegible]
"a [illegible] [illegible] and not is [illegible] the [illegible] is
a [illegible] of [illegible] is [illegible] a [illegible] [illegible] the [illegible]
is [illegible] [illegible] of the [illegible]. [illegible] it is in

imminent danger of insolvency or has been rendered insolvent by reason of such mismanagement". It is provided in the General Corporation Act of 1915 (Cahill's Statutes Chap.54, Sec. 5) as follows: "Courts of equity shall have full power on good cause shown to dissolve or close up the business of any corporation, to appoint a receiver therefor who shall have authority *** to sue in all courts and do all things necessary to closing up its affairs as commanded by the decree of such court."

In the instant case it is shown that the defendant corporation never pursued the purpose of its charter; that its property consisted chiefly of a piece of real estate which was worth from $20,000.00 to $30,000.00; that its only source of revenue was the rent which it received at the rate of $200.00 a month under a lease to one Goldstein; that the real estate was subject to two mortgages, one of $7000.00 and one of $2100.00, which latter was in process of foreclosure owing to the failure of the defendant to pay interest on its indebtedness.

Although the charge of conspiracy in the bill of complaint is not entirely in conformity with what the evidence tends to prove, still it is only fair to say that it does charge Mehl, the president of the company, and others, with a concerted effort to cheat the complaining stockholders and the corporation through the foreclosure of the second mortgage out of the real estate in question. The evidence of A. Henry Goldstein supports the charge of conspiracy.

The chancellor saw the witnesses and considered the evidence which they gave as well as the pleadings in the case, and was in a better position to determine the necessity,

if any, for a receiver, than we are.

It would seem, under all the circumstances, considering that the corporation has ceased doing business, if in fact it ever began; that practically its only property is real estate upon which there are two mortgages; that there is danger by reason of the conduct of the owner of the second mortgage through her husband, Kohl, president of the defendant company, that the assets of the defendant company may be fraudulently disposed of to the serious injury and detriment of the complainants, that a receiver ought to be appointed. It would seem but fair and reasonable as well as equitable, in such a case as this, where practically the total assets of the corporation are made up of a single piece of real estate which may be easily and without great expense taken charge of and managed if necessary for the benefit of the stockholders and creditors of the corporation, and where there is danger that if the assets are left at the mercy of the defendant they may be lost to the creditors and stockholders, to order a receiver.

If no receiver were appointed it might well be, assuming the allegations of the bill to be true, which allegations are not all denied by the evidence that the corporate property would be wasted. If the object of the foreclosure of the second mortgage, which is prosecuted in the name of the wife of one of the officers of the corporation,(and which suit apparently is not being defended) is primarily to obtain complete control of practically all the assets of the corporation, that is its real estate, and is the result of a conspiracy with that purpose in view, the complainants are certainly entitled as a matter of right to the aid of a court of equity.

The decree of the chancellor is, therefore, affirmed.

AFFIRMED.

Thomson J.and O'Connor P.J. concur.

If any, is a problem, this we are.

It must seem, then, as the litmus-test, considering that the interpretive law seems fairly settled, if is that it was that begin, that initially the only property is that which upon which there was the surrounding that have to be beaten by reason of the control or the water or the drains matters through the latter, and, previous to the treatment manner, that the claims of the riparian owners only is treacherously dispensed of in the notion laying the basis of the complaints, that a similar water is to be diverted, it might -we hat that the treacherous is will be diminished, it seem a line of text, which particularly the title stuff of the expression its work by of a single place or that which which may be easily and clearly proved through which change it and changed it measurably the the result of the alterations and benefits if the waterfalls, in other there is clear that if the lands are left at the water if the riparian may be lost in the building and construction. In other a character,

If in remedies more expedient it right will be, without the alterations of the bill is be true, which alterations are not all taking of the matters but the riparian property notice of water. If the rights of the riparian of the source matters, which is presented if the mere of the mile of one of the diminution if the alterations, not where that especially is not after damaged; in practice to treats complaints-chief at practically all the stands of the riparian, that in the real source, and in the result of a monitoring site diminution to show, the significant the particular without as a matter of right to the bill of a water of equal.

The change of the riparian is, consequent, alternate.

[1]Lemon 1.and O'Donnor P.1. stand.

[illegible]

Opinion filed May 17, 1932.

290 - 28464

CHICAGO JUNCTION RAILWAY CO., a corporation, Petitioner, v. DOLLIE F. LEITCH, et al, Respondents,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
HARRY S. MACARTNEY, Lien Petitioner, Appellee, v. DOLLIE F. LEITCH and OLIVE LEITCH, Respondents, Appellants.	

225 I.A. 658

MR. JUSTICE THOMSON delivered the opinion of the court.

In this proceeding the Railway Company filed a petition to condemn certain property, owned by the respondents, for railroad purposes. The lien petitioner, Macartney, with one Huey, represented the respondents in that matter. Before the case was reached for trial the Railway Company concluded to dismiss the proceeding and in conference with counsel for the respondents it was agreed that the Company should pay, as attorneys' fees, under provisions of the statute relating to that subject (Ch.47, Sec. 10, Cahill, p. 1638) the sum of $10,000.00, and the further sum of $1,807.06 as and for costs and expenses incurred by the respondents. As set forth in the opinion of this court on the former appeal of this case, Chicago Junction Ry. Co. v. Leitch, 215 Ill. App. 67, pursuant to the order of the court, the Railway Company paid to the clerk of the court,

to abide the further order of the court, the sum of $5,500.00. It appears that the balance of $6,307.06 was paid by the Railway Company to Mr. Huey, representing the respondents, but it appears he has retained that amount on account of his fees. The lien petitioner filed his petition, claiming an attorney's lien as against the funds in the hands of the clerk of the court. On the former appeal this court held that "The ultimate question of fact to be determined in this case was not how much is Mr. Mecartney entitled to as fees for his services rendered the respondents under his alleged agreement with them, but the question is, For what amount should he be awarded an attorney's lien as against the money paid into the court by the Railway Company?" It was further held that the fact that Mr. Mecartney and Mr. Huey, representing the respondents in the condemnation proceeding, had agreed with the Railway Company that the amount to be paid by the company to the respondents under the statute, as and for their attorneys' fees, should be the sum of $10,000.00, operated to estop them from claiming more than that amount as their joint and several fees due them from the respondents, for services rendered in that proceeding and, further, that their fees would not necessarily be an equal amount, but should be for such proportionate parts of the $10,000.00 as it could be shown the services each of them had rendered entitled them to. It appeared from the record that Mr. Mecartney had rendered certain services for the Misses Leitch, which were not directly involved in the condemnation proceeding, but for which he might be entitled to certain fees, as to which, however, he would not be entitled to a lien against the fund paid into court by the Railway Company under the provisions of the statute, inasmuch as such fund had to do solely with services rendered by counsel

to make the racing event of the month, the one of 14,000.00. It appears that the income of 14,000.00 was paid by the racing company to Mr. Shay, representing the promoters, but it appears to be a question that should be decided at trial time. The line particular film the petition, claiming an attorney's lien on account the fact is the month of the start of the work. If the jointly signed bills only had this disputable question of fact to be litigated in this case and not the amount to Mr. Sweeney entitled to be then for its services rendered the respondents under the signed agreement with them, but the question by the good amount should be be entitled an attorney's lien on account for money paid into his court by the racing company? In the further note that the case Mr. Sweeney had Mr. Shay, representing the respondents in the negotiations preceding, had agreed with the building company that the amount to be paid by the company to the promoters under the racing, on and for their attorneys' fees, should be the sum of 14,000.00, however to make sure that claiming more than that amount of their joint and separate fees the time from the recommendation, the negotiations involved so that everything and, further, that their fees could not necessarily be on equal income, but should be for over proportionate share of the 14,000.00 as it seems to depend the number each of the that involved multiple fees. It appeared from the record that Mr. Sweeney had received certain certain for the times letter, which were not directly involved in the commission proceeding, and he made to right to minimize to another fee, as he might, however, it could not be in a time matter the time not take place by the matter through some the provisions of the matter, however as was then not to be usually of certain amounts by an and

directly in connection with the condemnation proceeding. On the former appeal the judgment of the trial court was reversed and the cause remanded with directions to the trial court to determine the amount of the fees to which the lien petitioner was entitled for services rendered in connection with the condemnation case, and to further find the amount for which the lien petitioner might be entitled to a lien as against the funds in the hands of the clerk of the court. We endeavored to make it clear in the former opinion, that for the reasons already stated, Mr. Mecartney and Mr. Huey together should be limited in the amount to be charged the Misses. Leitch for legal services in the condemnation case, to the sum of $10,000.00; that the trial court should determine what part of the $10,000.00 the lien petitioner was entitled to as fees in that case; that having determined that question, there should be deducted from that amount the total payments the Leitch sisters had made to the lien petitioner on account of his fees and that the petitioner should be given a lien for the balance.

After the cause was remanded, a hearing was had in the Circuit Court on the foregoing questions and the court found that Mr. Mecartney and Mr. Huey were entitled to the $10,000.00, as and for their fees for services rendered in the condemnation case, in the porportion of seven tenths to Mr. Mecartney and three tenths to Mr. Huey, and that of the $7,000.00 to which Mr. Mecartney would be entitled, he had been paid $4,569.06, leaving still due him the sum of $2,430.94.

In the order from which the former appeal was taken, the court found that the lien petitioner was entitled to a total of $7,000.00 as and for his fees for services ren-

dered. It appears from the record now before us that in the last hearing of this matter in the trial court, it was held that $200.00 of that amount represented fees for services which were rendered by Mr. Macartney outside of the condemnation case, and that the total amount to which he was entitled as fees for the services rendered in the condemnation case was $6,800.00. From that amount there was deducted the payments Mr. Macartney had received, namely, $4,569.06, leaving a balance of $2,230.94, which the court found was still due the lien petitioner from the respondents for fees in the condemnation case, on which amount the court allowed the lien petitioner interest at 5 per cent from April 3, 1918, amounting to $273.48, which sums the court adjudged and decreed that the clerk pay to the lien petitioner out of the funds in his hands in this case. From that order, the respondents have perfected this appeal.

In support of the appeal the respondents first claim that on the rehearing of this matter after the case had been reversed and remanded to the trial court, the court erred in sustaining the petitioner's objections to their motion that Mr. Huey be made a party to the proceedings. In our opinion the court did not err in this regard. The sole issue in this matter is one between the lien petitioner and the respondents, involving the amount for which the lien petitioner is entitled to a lien as against the funds in the hands of the clerk of the court, it being apparent that the respondents would be entitled to the balance of that fund after such lien was satisfied. If Mr. Huey has secured possession of that part of the $10,000.00 over and above the amount that was paid to the clerk of the court and if that

Sered. It appears from the record the [illegible] on the last hearing of this matter in the trial court, it was held that $627.50 of this amount represented fees for services which were rendered by Mr. [illegible] of the condemnation case, and that the total amount to which he was entitled as fees for the services rendered in the condemnation suit was $4,800.49. From that amount there was deducted the payments [illegible] and [illegible], namely, [illegible], leaving a balance of $2,238.95, which the trial court has found was due the lien petitioner from the respondents for fees in the condemnation case, on which amount the court allowed the lien petitioner interest at 5 per cent from April 5, 1935, amounting to $671.84, which made the total judgment and decree that the clerk pay to the lien petitioner out of the funds in his hands in this case. From that order, the respondents have perfected this appeal.

In answer to the appeal the respondents claim that in the reopening of this matter after the case had been reversed and remanded by the Appellate Court, the court erred in sustaining the petitioner's objections to their motion that Mr. Hemp be made a party to the proceedings. In our opinion the court did not err in this respect. The sole issue in this matter is one between the lien petitioner and the respondents, involving the amount for which the lien petitioner is entitled to a lien as against the funds in the hands of the clerk of the court, it being conceded that the respondents would be entitled to the balance of this fund after such lien was satisfied. If Mr. Hemp had [illegible] possession of that part of the [illegible] the amount that was paid to the clerk of the court and of that

amount has been retained by him and that amount, together with the amount which the respondents had paid Mr. Huey on account of his fees, is in excess of the amount to which he is entitled as fees, that is a mater which must be settled by the respondents and Mr. Huey. We see no reason why that controversy should incumber the record of this proceeding, which involves solely a question as between Mr. Mecartney and the respondents on the question of his fees.

The respondents make the further point that the Circuit Court erred in denying their motion for a trial by jury, but the point was not argued and it must therefore be considered as having been waived. Of course, the contention is not tenable.

It is further urged in support ofthe appeal that the trial court erred in allowing interest to the lien petitioner. The interest allowed by the trial court was from the date of the original order entered on the petition filed by Mr. Mecartney, which was the order appealed from on the former appeal. In the brief filed by the appellee petitioner on this appeal, in referring to this question of the allowance of interest by the trial court, the petitioner maintains that he was entitled to interest under the statute. He claims interest on the $2,230.94, for which he was given a lien, from the date of the order of the trial court from which this appeal was taken, namely, July 6, 1920. But apparently, the further claim is made that although the petitioner is only entitled to a lien as against the funds in the hands of the clerk of the court to the extent of $2,230.94, he will ultimately be entitled to recover from the respondents as and for all of his services rendered for them, including those

not directly connected with the condemnation case, the total sum of $2,430.94, in addition to the amounts he has already been paid, and that the original decision in the Circuit Court, from which the former appeal was taken, amounted to an award to that effect and that, therefore, under the provisions of the statute relating to interest (Sec. 2 and 3, chapter 74, Cahill, p. 2090-2091) he should be given interest from the date of such former decision. In our opinion the trial court erred in allowing any interest at all. The only question before the court in this proceeding involves a determination of the proper amount to be paid the lien petitioner out of a fund which has been paid in to the clerk of the court, as and for attorney's' fees by the Railway Company, under the provisions of the Statute on Eminent Domain. The petitioner in no event could claim interest on the amount for which it has been found he is entitled to a lien under the order of the Circuit Court here appealed from, for any period of time prior to the date of such order. But, in our opinion, the petitioner should not recover any sum as interest from the respondents or from that part of the fund in the hands of the clerk of the court to which the respondents will be entitled after that portion to which the petitioner has been found to be entitled, has been paid.

For the reasons stated the judgment of the Circuit court, appealed from, is modified by eliminating therefrom all provisions relating to interest, and the said judgment as so modified, awarding the lien petitioner the sum of $2,230.94 from the funds in the hands of the

clerk of the latter court in this case, is affirmed.

In our opinion there is much merit in the contention of counsel for the respondents to the effect that said respondents have been deprived of the use of the funds to which they were entitled, and have been put to much additional expense, due in a large part to a controversy between the two lawyers retained to represent them in the proceedings originally brought by the Railway Company, and, under the circumstances we are of the opinion that the costs incident to the proceedings in the trial court following the former decision in this court, and the costs in this court on this appeal should be borne by the lien petitioner.

JUDGMENT MODIFIED AND AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

Opinion filed May 17, 1922

41 - 24991

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

MAX KLYCZEK,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error, the plaintiff in error, Klyczek, seeks to reverse the judgment of the Criminal Court of Cook County, by which he was found guilty of contributing to the delinquency of a female child, upon which finding and judgment he was sentenced to serve one year in the State Reformitory at Pontiac and to pay a fine of $200.00.

In support of the writ of error it is first contended that at the time of the alleged offense the defendant was under the age of seventeen years and that, therefore, the Criminal Court of Cook County was without jurisdiction and that it was the duty of the trial court to turn the defendant over to the Juvenile Court. As to this point it is sufficient to say that it was not raised by the defendant in the trial court. It was, therefore, waived and cannot be raised now. Jurisdiction of the person is waived by going to trial without objection. People v. Day, 219 Ill. App. 641. Furthermore, by paragraph 26 of Article VI of our Constitution it is provided that the Criminal Court of Cook County shall have jurisdiction in all criminal cases arising in the county.

By statute, the Juvenile Court has been given concurrent jurisdiction in all criminal cases involving children under certain ages, but no statute has been nor could be passed having the effect of taking away the jurisdiction of the Criminal Court which it has as a result of the constitutional provision referred to.

It is next alleged that before one may be found guilty of the offense charged in this case, the State must prove beyond a reasonable doubt that the female child involved either was or became a delinquent. Of course, this is not the law. One may properly be found guilty of the crime of contributing to the delinquency of a child, under the statute, if he knowingly and willfully does acts which directly tend to render the child delinquent.

It is further contended that a certain confession of the defendant, offered and received in evidence, was improperly received, inasmuch as the evidence showed that it had not been made voluntarily but as the result of certain promises which had been made to the defendant by the police officer who arrested him. On this point there was a sharp conflict in the testimony. The officer in question testified that no such promises were made; that he told the defendant the best thing he could do was to tell the truth about everything he had done and further, that any statement he made might be used against him. The defendant testified that he was told by the officer that if he answered all the questions that were put to him in the affirmative he would be permitted to leave the jail where he was being held and go to his home. Another police officer corroborated the officer above referred to, and testified that he was in and out of the room during the

by analogy, the Phenomenon Theory has been given considerable Justification in all economical cases involving utilities under certain aspects, but on another hand there has been a general having the effect of taking away the productivities of the Economic Sphere which it has as a result of the constitutional restrictions referred to.

It is some slight but further one may be doubt as to the utility of the different concepts in this theory, the final term proves indeed a reasonable basis for Pareto's equilibrium which was at further a difficulty. Of course, this is not the line. One may possibly be doubt quite of the value of establishing in the existence of a utility, under the theories, if he knowledge and utility are with which scarcely need to render the equal difficulty.

It is further assumed, I can a strong preference of the intensity, giving not required to subjectively, and the primarily involved, however, on the evidence thereof that it has not been quite satisfactorily but in the result of certain questions which has been made to the interested in the value affirm the accepted fact. In this point there is a strong agreement in the theory. The affirm is possible inside that not so much problem was many that to find the actual act the best thing be merit as can to and the lines down everything so not into and theory, that my attempt is made which in good opinion has. The authority implies that he was said by the affirm that if he answered all the questions that were put to him in the affirmation to begin to provided to leave the just which be was being made and in the same. Another point affirm mentioned the utility many relations is, not implied that he was in one of the year during the

time of the conversation between that officer and the defendant, and was present at the time the alleged confession was signed by the defendant, and that there were no promises that he heard, of any sort. In this state of the record, the finding of the trial court to the effect that nothing had occurred to interfere with the admissibility of the confession as evidence, cannot be disturbed. There were some slight variations between the facts relating to the occurrence in question, as set forth in the confession and as testified to by the complaining witness. These, however, would not go to the competency or the admissibility of the confession as such, but merely to the weight to be given it as evidence. The complaining witness was one Alice Barkler, a girl of some 12 years. In the confession, the child attacked was referred to as "F. E. Parkler". This was the name of the child's father. The so-called confession was a written statement signed by the defendant and by the two police officers, referred to, as witnesses. One of the officers testified that he wrote out the statement as the defendant recited the facts. Apparently this mistake in the name was a mistake of the officer, and, in our opinion, does not effect either the validity or the value of the statement as evidence.

It is further contended by the defendant, in support of this writ of error, that the guilt of the defendant was not established by the evidence, beyond all reasonable doubt, but, on the contrary, there was sufficient evidence as to an alibi, to warrant this court in reversing the judgment of the trial court. A jury was waived in this case and the hearing was before the court. We have carefully examined all of the testimony as we find it in the record. The complaining witness

time of the conversation because that affair, and the deferment, was our reason at the time for the Grand Vizier's reluctance was shaped by the circumstances, one hour longer was no question that he heard, of any work. In this state of the country, the flooding of the total money to the offers that seemed had received in interview with the responsibility of the protection as without, needed to disembark. There were overwhelming claims between the Sadra Vizierate to the government in question, but that lack in the activities and an initiative in by the accomplishing efforts. There, however, would not be the same memory or the endeavoring of the requirements as ever, but merely in the weight to give it an existence. The complaining attempts was the Allied Service, a gift of have to years. In the meantime, the Allied allowed the reformist in a 40, a Sadrian. This was the case of the military claims. The newspaper mentioned was a written statement signed by the Sultanate and by the the public affairs, reported by, the Minister. All of the efforts Sadrian was to work and the statements on the government months the years. Accordingly this attempt to the more was a criticism of the activity, and, in our country, the an official opinion for solution of the value of the statements as activity.

It is further indicated by the statement, in accord of that was or or by, that the point of the statement was not explained by the attempt, beyond all reasonable doubt, but, as the writing, there was an illegal attempt to be with, in another, but merely in providing the judgment of the total court. A fact was maker in this case and the Sultanate was the value. He have markedly measured all of the indication may be by that it to the record. The specifically attempt

testified that while she was on her way to school, on the morning of February 11, 1920, between eight thirty and nine o'clock, she experienced the attack complained of. The school was about three quarters of a mile from her home and at the time she was attacked she was about half way to school. There were no houses or buildings between her house and the school. She first noticed the man who attacked her, apparently following her from behind, and on the other side of a hedge; that A few moments after she first noticed him, she looked again to see who was making the noise she kept hearing on the other side of the hedge, and as she did so, the man grabbed her; that He were an army overcoat and a cap and he had a red handkerchief over his mouth and nose. As soon as the man grabbed her, she began to kick and fight and the attack was not accomplished. She testified that she fought for several moments and then did not remember what occurred, but was not able to say whether she lost consciousness. When it was over, her mouth and lips were bleeding and her clothing was badly torn and disarranged and covered with dirt, by reason of her being thrown to the ground. She immediately complained to her mother and the latter summoned her husband who made complaint to the police. On the following July 7, the defendant was charged, by two boys, with having attempted to hold them up. They were in the neighborhood of the place of business of the father of the complaining witness in this case. He came out into the street and stopped the defendant as he was walking along, and started to question him. Apparently he suspected that this man might be the man who had attacked his little girl. The entire neighborhood seems to have been aroused by the occurrence on July 7, and as the defendant was being questioned by Mr. Parkler, a good many people congregated, and among them the

complaining witness, Alice Parkler. Her father asked if this was the man who had attacked her. She testified that she told her father, "He was just almost like the man; that he carried the same description in height and complexion." As to this occurrence, Mr. Parkler, testified that his daughter took about five minutes to decide whether this was the man, and during that period, the defendant talked to her and claimed he knew her and that he had gone to the same school she had, but she replied she did not remember that; that he told his daughter not to accuse the defendant unless she was absolutely sure; and she said; "I think that is the man. I am almost sure of it, he talks like him and is dark complexion like he looked, and about his size." Thereupon, Parkler turned the defendant over to the police. The officer who took the defendant into custody testified that when he searched him he found a revolver containing two loaded cartridges, and several empty shells. He also found two red handkerchiefs, one partly faded and one looking as if it were new; and he said the defendant stated that he had bought the revolver from another Polish boy the previous December, and that he and his friend went out every Sunday afternoon and did some shooting; that he asked the defendant if he had done anything else besides carrying the revolver and that later he had said to the defendant; "You are the boy that held up this Parkler girl", and that he said he was; that the witness asked the defendant how he was dressed and he said he had an army coat on which he had procured from a friend of his, and that he put a handkerchief over his face and grabbed hold of the girl and knocked her down; that he was going to attack her but she started to fight and he heard some voices of boys

sympathetic silence, Alice thought. But Father added it
like one to whom had actually been. The inspiration came
who said her Father, "We are just closed this for many just
be closer to some observation in Belgium and complaining."
In a tone prominent, Mr. Morley, resisting his air
daughter took about five minutes to decide whether this was
the man, and during that period, the attendant behind it had
and finished to have her eyes to her gown to the room
behind the bed, but the feeling she did not remember that; that
he held her daughter not to answer the determined unless she
was absolutely sure; and she said, "I might look in the room.
I am almost sure of it, to take like the not in fact com-
plexion like he looked, and about his face." Furthermore,
Father turned the drawing over to the waiter. The strange
man said the telephone into hastily pretending that then to
interfere him to found a receiver containing two lumber mid-
night, and covered single stable. He also found the ex-
hundredbelle, one merely fated one the leaning on it in
were room; and he said the telephone stated that he has bought
the receiver from another fellow by the pictures therefore,
and that he and his friend went out every among afternoon
and did some something; that he added the telephone at he had
done morning also therefore accepting the receiver and that
later to have said to the attendant; "You are the man said
by this further girl", and said to said to many that the ate-
room added the telephone and he was present and he said to had
an only read an article he had presented from a friend of his,
and that he had a handkerchief over his face and looking into
of the girl and looked for money that he was going to attack
her but she started to think she be found some voices of boys

and girls who were approaching, and he ran away. The officer further testified as to his writing out the statement later signed by the defendant and that he wrote down the facts as stated by the defendant. In this written statement, it is set forth that when the defendant approached the Parkler girl he pointed a gun at her and told her to throw up her hands; that he had a red handkerchief around his face; that he got hold of her and knocked her down and lifted up her clothes, and that he wanted to rape her; and that he then heard voices and got scared and got up and ran away; that on that morning he wore an army overcoat that one John Klyszek gave him; that after it wasover he ran through the field and went home. The complaining witness testified that upon the occasion in question she saw no revolver. Reference has already been made to the substance of the defendant's testimony with regard to the making of the confession. He further testified that when he was arrested, the gun he had in his pocket was one he had procured because of his desire to have something in the way of a celebration on the previous Fourth of July and that at the time of his arrest he had no loaded cartridges. He denied that he had ever talked to Mr. Parkler, the father of the complaining witness, in one part of his testimony, and in another part of his testimony he says that he told Mr. Parkler that the statements he had made in the alleged confession were true. The defendant further denied, categorically, the alleged occurrence here complained of.

On the question of the alibi, the defendant testified that on February 11, he was employed by the Hero Furnace Co., which was located some distance away from the point at which the complaining witness was attacked, and that on that day he was at work at the furnace company shops from seven

o'clock in the morning until four thirty in the afternoon. One H. E. Clutterham, the superintendent of the furnace company, testified that the defendant started to work with them about the middle of January and continued until sometime in July; that on February 11, 1920, the defendant worked nine hours, beginning at seven in the morning and quitting at four thirty in the afternoon. The witness produced certain records for the week ending February 12. These records showed that the defendant was off one day during that week, which the witness said was the first day of the week,- "It was probably about the sixth." On cross-examination he stated that he could not say whether he was present at the factory all during the day on the eleventh and that he could not state from his own personal knowledge that the defendant worked at the factory nine hours on that day; that all he knew was that the records produced credited the defendant with nine hours on that date, and that none of it was over time. One Bremlin, a sheet metal worker, employed by the furnace company, was asked whether the defendant worked there on February 11, and he said he could not remember; that he had only seen the defendant off once, which was on the occasion of his getting hurt in some way; this he said was during the summer. The witness then said he was sure the defendant was working there every day throughthe month of February. Robert Clutterham testified that he was employed by the furnace company from about February 6, on; that he knew the defendant, who worked in the same room with him and that as far as he could remember, he was working there, during the days in February, when the witness was there. The records produced by the witness H. E. Clutterham, showed that there were three days in the week of April 9, when the defendant was not working, which would seem to weaken the testimony of

some of his co-workers to the effect that he was not absent from his work at any time. These records also contradict the testimony of the witness Bremlin, who said he was sure the defendant was at his work every day in the month of February,- the records showing that there was at least one day during the week of February 12, when he was not working. When it was sought to introduce these records, objection was made, unless it was shown that the witness made them himself. He was then asked about this and he stated that he had not made them himself. It later developed in his testimony that one Pepper was the foreman of the plant at the time in question and that he made a record of the time of the employees on slips which he turned into the office, and apparently H. E. Clutterham, the superintendent, made up the record introduced in evidence, from these slips. The slips were not produced and the foreman did not testify, although he had been subpoenaed as a witness. He was in court the day before he was called upon to testify but did not return the following day and efforts to reach him failed.

In this state of the record we are not in a position to say that the defendant was not proven guilty beyond a reasonable doubt. There is a sharp conflict in the evidence. The trial court saw the witnesses and heard them testify and was in a much better position to judge of their credibility than we are. The evidence relating to the alibi is not very convincing,- its accuracy is not properly established and although objection was not insisted upon as to its admissibility, the weakness referred to affects its value materially.

Finally, the defendant calls attention to the fact that upon praying an appeal to this court, it was allowed upon the condition that the defendant filed his bond in the sum of $5,000.00, and that later, without the knowledge of the defendant, the court vacated and set aside the order fixing bail, and it is contended that in this the trial court erred, it being the duty of the court to stay the mittimus on condition the defendant furnished a good bond. This point is not tenable. The proceedings involving an appeal from the trial court were irregular, including that involving an appeal bond. The record does not show that the defendant made any motion requesting the court to stay the mittimus, pending the suing out of a writ of error and the application for a writ of supersedeas.

We find no error in the record and therefore the judgment of the Criminal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

Opinion filed May 17, 1922.

58 - 27006

G. H. RUHNKE, Defendant in Error, v. GEORGE E. POTTINGER, EDWARD BALLARD & RAY B. WHITMAN, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

225 I.A. 658

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Ruhnke, brought this action in contract in the Municipal Court of Chicago against Pottinger and Ballard, as co-partners doing business as Ballard, Pottinger & Co., to recover an amount alleged to be due him from the defendants on two promissory notes and on an account stated. The defendant, Edward Ballard appeared and denied the co-partnership alleged and also that there was any indebtedness due the plaintiff. A trial was had before the court without a jury, resulting in a finding for the plaintiff, whose damages were assessed at the sum of $801.14. To reverse the judgment of the trial court for that amount, the defendant Ballard sued out this writ of error.

It appears from the record that one Frank E. Ballard and the defendant Pottinger were in business as a co-partnership under the name of Ballard, Pottinger & Co. On April 5, 1916, Frank E. Ballard died. It also appears that the defendant Edward Ballard and one Whitman, were copartners doing business under the name of Ballard, Whitman & Co.

Opinion filed May 17, 1922.

92 - 8904

T. A. Bennett,

Defendant in error,

v.

Charles J. Pelliccia,

Plaintiff in error.

Error to Superior Court of Cook County.

Judgment affirmed.

Mr. Justice Thomas delivered the opinion of the court:

The plaintiff below, Joseph Bill, sued in assumpsit in the municipal court of Chicago against Pelliccia and Bellard, as copartners doing business as Bellard & Pelliccia, to recover money paid to defendants for the purchase of a certain automobile and for the expenses incurred and trouble and inconvenience suffered by the plaintiff. A trial was had before the court without a jury, resulting in a finding for the plaintiff, whose damages were assessed at the sum of $267.14. To review the judgment of the trial court for that amount, the defendant Bellard has sued out this writ of error.

It appears from the record that one Frank E. Bellard and the defendant Pelliccia were in business in a partnership doing under the name of Bellard, Pelliccia & Co. In April, 1918, Frank E. Bellard died. At the time of his death the defendant owned Bellard one-fourth interest, and copartnership debts amounted to $[illegible]. Thereon a [illegible]

After the death of Frank E. Ballard, the firm of Ballard, Whitman & Co., acquired the interest of Frank E. Ballard or of his widow, in and to the assets of the partnership of Ballard, Pottinger & Co. (which fact does not appear in the record, except as it is recited in the contract hereinafter referred to) and, thereafter, on September 27, 1916, they entered into an agreement with Pottinger, appointing them his agents, and giving them authority to carry on the business of Ballard, Pottinger & Co. for the purpose of winding it up. Under this agreement, this agency was to continue until January 1, 1917. Under date of December 30, 1916, the agency agreement was extended to and including July 1, 1917.

The plaintiff's claim consisted of three items - one a promissory note for $450.00, dated October 1, 1917, and another a promissory note for $175.00, dated November 5, 1917, each of which notes was signed "Ballard, Pottinger & Co." and each one being a renewal note executed to take the place of a prior one of like amount. The other item, going to make up the plaintiff's claim, consisted of an account stated, in the sum of $156.90, with interest. It was admitted that one of the notes involved was signed by the defendant Edward Ballard and the other was signed by Whitman.

Only one point is urged by the plaintiff-in-error in support of his contention that the judgment of the trial court should be reversed and this point involves the question of fact as to whether the defendant Edward Ballard, who apparently was the son of Frank E. Ballard, above referred to, was a member of the firm of Ballard, Pottinger & Co., or, if not, whether he held himself out as a partner so as to now be precluded from asserting the contrary. The only issue of fact

involved in the evidence has to do with the latter question, namely, the question of whether the defendant Ballard held himself out as a partner in the firm of Ballard, Pottinger & Co. On that point there is a direct conflict in the evidence. The plaintiff testified that the defendant Ballard told him that he was a member of the firm of Ballard, Pottinger & Co., consisting of himself, Whitman and Pottinger. This was in a conversation occurring early in the year 1918. He also testified that in a conversation with the defendant Ballard, in the presence of Whitman, in June or early in July, 1917, he requested a payment on his account due from Ballard, Pottinger & Co. "for work ordered by Mr. Ballard and different members of the firm at different times"; that the balance then due was $156.00; that Ballard stated they were pretty hard pressed for funds and were not in shape to pay much; that they could not give him a check as it had to be countersigned by Mr. Pottinger and he was not in. One Willis testified that in a conversation he had with the defendant Ballard on November 1, 1916, the latter told him that the firm of Ballard, Pottinger & Co. consisted of Pottinger, Whitman, and himself.

The defendant Ballard denied that he had ever made the representations to the plaintiff above referred to, about which the latter testified. He admitted that he had had a conversation with Willis but stated that he did not tell him that he was a member of the firm of Ballard, Pottinger & Co., but that he stated to Willis that because of the death of Frank N. Ballard, the partnership had ceased; that the surviving partner had the legal right to wind up the partnership business and that "we arranged with Mr. Pottinger to handle it for him as agents", referring apparently to Ballard, Whitman & Co. As to the

involved in the evidence has to do with the latter question, namely, the question of whether the defendant Gilliard held himself out as a partner in the firm of Ballard, Pettinger & Co. On that point there is a direct conflict in the evidence. The plaintiff testified that the defendant Gilliard told him that he was a member of the firm of Ballard, Pettinger & Co., consisting of himself, Pittman and Pettinger. This was in a conversation occurring early in the year 1915. He also testified that in a conversation with the defendant Gilliard, in the presence of Pittman, in June or early in July, 1917, he requested a payment on his account due from Ballard, Pettinger & Co. [illegible] by Mr. Ballard and different members of the firm at different times; that the balance then due was [illegible]; that Gilliard stated they were greatly hard pressed for funds and were not in shape to pay now; that they would not give him a check as it had to be countersigned by Mr. Pettinger and he was not in. The Willis testifies that in a conversation he had with the defendant Gilliard in December [illegible], the latter told him that the firm of Ballard, Pettinger & Co. consisted of Pettinger, Pittman, and himself.

The defendant Gilliard denies that he had ever made the representation to the plaintiff which [illegible] as the latter testifies. He testified that he only had a conversation with Willis and stated that he did not tell him that he was a member of the firm of Ballard, Pettinger & Co., but that he stated to Willis that because of the death of Joseph E. Ballard, the partnership had ceased; that the surviving partner had the legal right to wind up the partnership business and that he arranged with Mr. Pettinger to handle it for him as agent, referring apparently to Ballard, Pettinger & Co. As to the

latter conversation, Willis testified in rebuttal, that he wastalking with the defendant about the death of Frank E. Ballard and he asked the defendant of whom the firm consisted and that the defendant told him that Whitman had purchased the interest of the widow of Frank E. Ballard in the partnership and that he (the defendant Ballard) and Whitman had an equal share in one-half of the partnership and that Pottinger had the other one-half interest. Willis further testified on cross-examination, that he understood they were going to wind up the business of the firm and pay their debts,- "That is what Edward Ballard told me and he told me that he and Whitman were partners."

The defendant Ballard being recalled, testified that he told Willis that he and Whitman had purchased the interest of Frank E. Ballard in the firm of Ballard Pottinger & Co. and he further testified that the fact was that some time prior to that time, they had acquired such interest from a sale in the Probate court. The defendant introduced in evidence the contract between Pottinger, Whitman and himself, dated September 27, 1918. This contract was between Pottinger, as party of the first part, and Ballard and Whitman as parties of the second part, as copartners under the name of Ballard, Whitman & Co. This contract recited the death of Frank E. Ballard and the consequent dissolution of Ballard, Pottinger & Co. It recited that the second parties had acquired the interest of Frank E. Ballard in the assets of that firm; that the partnership did not have sufficient moneys to meet certain open accounts and it was the desire to collect sufficient accounts due the partnership, and to sell such of its assets as might be necessary to meet all partnership debts, represented by such open accounts, and make a

Laird's memoranda, their inability to realize, has to
sympathizing with the difficulties where the minds of Frank D.
Dalling and Mr Arthur the mechanics of which the time consistent
are that the difficulties arise was that either that investigated
the interest of the story of Frank D. Dalling in his previous-
ship and their the life introduced Dalling and Thirkum that in
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up the business of the film and say their story.- That is some
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pension.?

The evidence Dalling being examined, testified that
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of Frank D. Dalling in the film of Dalling Enterprise & Co. and
he further testified that the fact was that some time prior to
that time, they had acquired only interest from a note in the
Dyblie story. The difficulty experienced in relation the cross-
examination testimony, Thirkum and Jackson, were requisions
ET, 1918. This memorial was Thirkum Enterprise, as party of the
first part, and Dalling and Thirkum as parties of the second
part, as stockholders under the name of Dalling, Thirkum & Co.
This contract recites the deals of Frank D. Dalling and the
government arrangements of Dalling, Thirkum & Co. It provides
that the second parties had acquired the interest of Frank D.
Dalling in the camera of that time; that the partnership did not
have sufficient money to cash certain claims and it was
the desire to raise sufficient necessary due to partnership,
and to sell such of its assets as might be necessary, in order all
partnership debts, represented by such claims accounts, and make a

division of the remaining assets of the partnership. It further recited that the parties of the second part were willing to devote their time up to January 1, 1917 to that end; and that the party of the first part was willing that they undertake the collection of the accounts owing to him as the surviving partner of Ballard, Pottinger & Co., and the selling of such of its assets as might be necessary for the aforesaid purposes. It was then set forth that the party of the first part, appointed the parties of the second part his agents, with authority to collect all accounts then due or that might afterward become due to the party of the first part, as the surviving member of the firm of Ballard, Pottinger & Co., and sell so many of the assets of the firm as might be necessary to pay the open accounts then due by the party of the first part as such surviving partner, said agency to continue to January 1, 1917. It was agreed further that all moneys collected pursuant to this agency were to be deposited in the name of Ballard, Pottinger & Co., and that after expenses were paid, the accounts of the creditors of the firm were to be duly paid. It was further agreed that the parties of the second part were to have possession, control and direction of the offices and affairs of Ballard, Pottinger & Co. subject to the right of the first party to keep his desk in the office and that all business transacted by the parties of the second part was to be in the name of Ballard, Pottinger & Co. It was also agreed that each of the parties of the second part was to draw out of the funds of Ballard, Pottinger & Co., $25.00 per week, which was "not to be considered or treated as salary paid or received by the second party, but to be treated and considered as so much paid and received by them on account of their interest in the firm of Ballard, Pottinger & Co."

On this record we are not in a position to say that the finding of the trial court was against the manifest weight of the evidence. While the defendant denies that he held himself out as a member of the firm of Ballard, Pottinger & Co., there is direct evidence to the contrary, submitted in behalf of the plaintiff. Even the contract introduced by the defendant, in an effort to establish an agency and disprove a partnership, contains elements which tend, in some respects, to support the plaintiff's theory of a partnership liability on the part of the defendant. It recites the dissolution of the old partnership by reason of the death of Frank E. Ballard; the purchase by the defendant Ballard and Whitman, of the interest of the deceased partner in that partnership, and then, after making provisions for a continuation of the business on the theory of an agency, it provides for such continuance under the partnership name of Ballard, Pottinger & Co., and for a withdrawal of a given amount each week, by the defendant Ballard and by Whitman, not as a salary but "on account of their interest in the firm of Ballard, Pottinger & Co." This contract covered other interests in a company known as the Haywood Company which are not involved here. In our opinion the evidence is sufficient to support a judgment for the plaintiff on the theory that at the time the renewal notes which were sued upon were executed in the name of the partnership, one by the defendant Ballard and the other by Whitman, and at the time the open account sued upon became a stated account, the defendant had either expressly or impliedly, or in both ways, represented that the then existing partnership, known as Ballard, Pottinger & Co., consisted of Pottinger, Whitman and himself. The defendant points out that the amount owing the plaintiff, with the exception of a small part, was owing to him by the partnership of Ballard,

On this ground he was not in a position to say that the finding of the jury must was against the overwhelming weight of the evidence. While the defendant Davies was in said hospital as a member of the film at Ballard, Trelawney & Co., there is direct evidence by the servants, published in behalf of the plaintiff. When the servants testified by the defendant, in an effort to establish an agency and discharge a partnership, evidence also under such head, in some respects, to support the plaintiff's theory of a partnership liability on the part of the defendant. It raises the distribution of the profits personally by reason of the death of Frank X. Ballard the payment by the defendant Ballard and Gibson, of the liabilities of the deceased partner in that partnership, and also, after making provisions for a distribution of the business on the theory of an agency, it provides for such contingency under the partnership name of Ballard, Trelawney & Co., and for a distribution of a final amount such, by the defendant Ballard and by Gibson, not as a salary but in amounts of equal interest in the firm of Ballard, Trelawney & Co." These arguments advanced also indirectly in a strong manner as the figures tempory which are not involved here. In our opinion the evidence is sufficient to support a judgment for the plaintiff on the theory that at the time the removal notice which were seen were made recorded in the name of the partnership, and by the defendant Ballard and the widow of Gibson, and at the time the conversations had upon behalf a stated account, the defendant had ultimate majority or liability, as it was, interpreted that the time defining relationship. Here on Gibbs, Williams & Co., consisted of Gibson, Williams and Ballard. The defendant points out that the account owing the plaintiff, with the exception of a small part, was owing to him by the partnership of Ballard.

Pottinger & Co., prior to the undertaking of Whitman and himself to manage the affairs of that company, under their agreement with Pottinger and prior to the time plaintiff claimed the defendant Ballard held himself out as a member of the partnership. This is true, but in our opinion, it is not material. The two renewal notes sued upon were given after that time and the item based on open account became an account stated, after that time. It is contended that there is not sufficient proof of the account stated. With that contention we do not agree. There is evidence by the plaintiff which is not contradicted, that in June or July, 1917, he asked the defendant Ballard, in the presence of Whitman, for payment on the account due him from Ballard, Pottinger & Co. "for work ordered by Mr. Ballard and different members of the firm at different times" and that the defendant stated that they were hard pressed and were not in shape to pay much; that Ballard then promised a payment of $25.00 which was subsequently made; that on the occasion referred to, the defendant said they could not give him a check as it had to be countersigned by Pottinger.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. CONCURS;
TAYLOR, J. DISSENTS.

Twilight's End, prior to the establishment of Indemnus and Salomnif to manage the affairs of that country, began their dispute with Twilight and strive to be free of its influence, despite the Metamorphi Council that insists it was in a treaty at the protectorate. This is true, but is not relevant, it is the market. The two countries have been quite friendly since Twilight Zone and the Council on even economic treaties or concerned alliance, we've not done. It is considered that there is a multiplier effect of the economic market. With that negotiation we do not agree. Their is influence by the "disorder" which is not constructive, that is done to Only, that, in return the material market, in the strength of the nations, the economy as the economic use this Zone Zoiate, Twilight's End. "The area affected by it, Salomnif has different economic or the film is Twilight zone" and that the Metamorphi leader that and Bard strength and that not an model to our country that Zone produces a payment of $15.0 which was a-Bonnaventy main; that is the economic relation by, the Twilight and Long small but also a model so it had is the consolvenses of Indemnus.

Now the economic status, the increase of the commercial trade is utilized.

Conclusion.

Bibliography, A.J. Bonnaventy
Talent, J. Salomnif.

(248a)

38 - 26977

FRANK STOMPOR,
Defendant in Error,

vs.

JAMES F. RERABEK, Administrator of the estate of MARY STOMPOR, deceased,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

225 I.A. 6[illegible]

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 17, 1919, during the lifetime of Mary Stompor, a judgment by confession on a promissory note was entered against her in the Superior Court of Cook County for $1927.50, in favor of plaintiff. The note is for the principal sum of $1700, dated March 14, 1918, payable on demand to plaintiff's order, with interest at 6% per annum after date, and provides for $100 attorney's fees. On the day of its date it was signed by F. Stompor, the husband of Mary and a brother of plaintiff, and delivered to plaintiff. On June 15, 1919, F. Stompor, died. On June 16, 1919, at the request of plaintiff, Mary Stompor placed her signature in lead pencil upon the note immediately under that of F. Stompor, while she was on her death bed in a tuberculosis hospital in Chicago and not advised of the death on the preceding day of F. Stompor. She died intestate on June 23, 1919, (six days after the judgment by confession against her had been entered) leaving her surviving four minor children as her only heirs at law and next of kin. Shortly thereafter James F. Rerabek was appointed by the Probate Court of Cook County administrator of her estate, and he was also appointed guardian of said minor children. Subsequently on Rerabek's sworn petition the judgment confessed was vacated by the Superior Court and he was given leave to plead. He filed as administrator of the estate of Mary Stompor, deceased, several verified pleas, among them (1)

general issue, (2) that Mary Stemper "did not make and deliver the writing" as mentioned in the declaration, and (3) that she signed her name to said note on June 16, 1919, "without any consideration to her paid." After the cause was put at issue, and after Rerabek, as administrator, etc., had been substituted as defendant, there was a trial before the court without a jury. Plaintiff and one witness in his behalf testified, and Rerabek and two witnesses in his behalf testified. The court found the issues for plaintiff and assessed his damages at $1700, the face of said note, and on March 7, 1921, entered judgment for said amount against Rerabek, as administrator, etc., to be paid in due course of administration, which judgment it is sought by this writ of error to reverse.

No useful purpose will be served in a discussion in detail of the evidence. Suffice is to say that while it appears that Mary Stemper on June 16, 1919, placed her signature on the note at plaintiff's request in the hospital, it also clearly appears that she was in a very weak condition both physically and mentally, and that she did not receive any consideration at the time or at any time from plaintiff or anyone else for her said act. We are of the opinion that the judgment against Rerabek, as administrator of her estate, cannot stand, and accordingly it is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes and Morrill, JJ., concur.

38 - 26977

FINDING OF FACTS.

We find as facts in this case that the deceased, Mary Stomper, at the time she placed her signature on the note in question did not receive any consideration therefor from plaintiff or any one else, and that said note, as against her or the administrator of her estate, is without any consideration.

2/2/2

68 - 27016

AUGUST S. WERNHEIM,

Appellant,

vs.

MORRIS JOSEPH, SAMUEL JOSEPH and JOSEPH BROS. LUMBER CO., a corporation,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

225 I.A. 659

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 1, 1921, plaintiff (appellant) filed in the Municipal Court of Chicago a complaint in forcible detainer against defendants (appellees) charging them with unlawfully withholding from plaintiff the possession of certain premises in the City of Chicago. A trial was had before a jury resulting in a verdict finding the defendants not guilty. Subsequently the court entered judgment against plaintiff for costs and this appeal followed.

It appears that on February 26, 1916, plaintiff, by written lease, demised the premises to the defendants, Morris and Samuel Joseph, (designated as parties of the second part) for a term of five years from March 1, 1916 to February 28, 1921, at a monthly rental of $180, payable in advance; that subsequently the lease was duly assigned, by said lessees to the defendant, Joseph Bros. Lumber Co., of which corporation said lessees are officers and stockholders; and that the defendants were on March 1, 1921, and at the time of the trial, in possession of the premises. The lease contained the following provision:

> "And in consideration of the undertakings herein contained to be kept and performed by the parties of the second part, the party of the first part hereby agrees that at the expiration of the term created by this indenture the parties of the second part shall have the option of renewing this lease for an additional period of five (5) years upon the same terms, conditions and covenants as are contained herein, except that

the reserved rental shall be the sum of two hundred dollars ($200) per month instead of one hundred and eighty dollars ($180) per month, such option to be exercised by the parties of the second part by giving to the party of the first part written notice of their intention so to do at least six (6) months prior to the expiration of the term created by this demise."

Counsel for appellant in his printed brief here filed says: "The case turns upon the question as to whether the appellees (defendants), on or prior to August 31, 1920, gave the appellant (plaintiff) a written notice of their intention to renew. If they did, the judgment appealed from is correct. If they did not, the appellant was entitled to the possession of the property on March 1, 1921, and the judgment is erroneous."

It appears from defendants' evidence that on August 23, 1920, the house attorney of defendants, at their request, dictated a written notice to a stenographer, who transcribed it and handed it as transcribed, together with an envelope addressed to plaintiff at 118 N. LaSalle Street, Chicago, (where plaintiff then had his office) to said attorney; that said attorney then caused said notice to be signed by the secretary of the defendant corporation, and afterwards enclosed the notice so signed in the envelope, so addressed, and sealed and stamped the envelope and deposited it in a United States mail box; and that the letter containing said notice was never returned to the defendants although the envelope bore in the upper left hand corner the correct address of the defendant corporation. A copy of the notice referred to is as follows:

"August 23, 1920.

Mr. August S. Wehrheim,
118 N. La Salle St.,
Chicago, Ill.

Dear Sir:

This is to notify you that the undersigned assignee of lessees under a certain lease entered into with you on February 26, 1916, covering premises located at 1727-1759 Wellington Ave., Chicago, does hereby exercise its option of renewing said lease for an additional period of five years upon the same terms, conditions and covenants as are therein contained, except as to the reservation of the payment of rental of two hundred dollars ($200) per month.

Yours very truly,
JOSEPH BROS. LUMBER CO.

_____
Secretary.
Assignee of Samuel Joseph
and Morris Joseph."

The plaintiff, Wehrheim, testified that he did not prior to September 1, 1920, or subsequent thereto, receive such notice, or any written notice similar thereto. There was also testimony regarding certain conversations had between plaintiff and the Josephs during the month of September, 1920.

Counsel for plaintiff first contends that, as to the issue whether plaintiff received the written notice on or before August 31, 1920, the verdict is against the manifest weight of the evidence. It is well settled that proof of the mailing of a notice properly addressed is prima facie evidence of its having been received by the party addressed, and that this presumption of fact may be rebutted. (Hai v. American Bottle Co., 182 Ill. App. 636, 641; Meyer v. Krohn, 114 Ill. 574, 586; Young v. Clapp, 147 Ill. 176, 190.) Where proof of the mailing of a properly addressed notice to the party is made and said party denies that he received it, the question as to whether he received it is for the jury to determine under all the facts and circumstances in evidence (22 Corpus Juris, p. 102, sec. 44; Hai v. American Bottle Co., supra, p. 642; Meyer v. Krohn, supra.) After a careful examination of the evidence in the present case we are unable to agree with counsel's contention.

Counsel for plaintiff further contends that as a matter of law the provision in the lease, above quoted, required that the notice be served personally on the lessor (plaintiff) which admittedly was not done. While it is the law of this state that where a statute requires the giving of notice and there is nothing in the content of the law or in the circumstances of the case to show that any other notice was intended, personal notice must be

Yours very truly,
Robert Ross, Deputy Ch.

Certified,
Minutes of Council Meeting
and Public Hearing.

The plaintiff, Hartwick, testified that in did not write in September 6, 1966, or subsequent thereto, receive such notice, or any notice under the Public Lands Act. There was also testimony regarding certain conversations had between plaintiff and the Deputy during the month of September, 1966.

Counsel for plaintiff first submitted that, as in the issue whether plaintiff received the written notice on or before August 24, 1966, the evidence is against the manifest weight of the evidence. It is well settled that proof of the mailing of a notice properly addressed is prima facie evidence of its having been received by the party addressed, and that this presumption of fact may be rebutted. (Ill. v. Mercantile Bank Co., 181 Ill. 181, 188; Perry v. Jones, 216 Ill. 216, 217; Thomas v. Simon, 147 Ill. 378, 380.) Once proof of the mailing of a properly addressed notice to the party is made and said party denies that he received it, the question as to whether he received it is for the jury to determine under all the facts and circumstances in evidence (1 Trial Brief, p. 186, sec. 41; Ill v. Mercantile Bank Co., supra; p. 815; Perry v. Jones, supra.) After a careful consideration of the evidence in the record, we are unable to agree with counsel's contention.

Counsel for plaintiff further contends that on a reading of the provisions in the Lease, above quoted, requires that the notice be served personally on the lessee (Hartwick) which admittedly was not done. While it is the law of this state that where a lease requires the giving of notice, the lessor in getting in the business of the lessee in the circumstances of this case, is when there are other notice was intended, personal notice is to

given. (Hai v. American Bottle Co., 261 Ill. 362, 365), and there are cases holding that where notice is required to declare a forfeiture under a policy or certificate of insurance, forfeitures not being favored by the courts, the notice must be personally served, we do not think that this strict rule should be applied to a provision in a written contract requiring a "written notice" to be given of intention to exercise an option, as in the present case. (Consolidated Coal Co. v. Block & Hartman Smelting Co., 53 Ill. App. 565, 572; Hai v. American Bottle Co., supra.) In our opinion counsel's contention is without merit.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

after, that *v. Jackson Metal Co.*, 391 U.S. 416, 441, and there are cases holding that a state statute is invalid if it relates a fundamental value to a policy of restriction of investment, particularly not being framed by the courts. The cases deal in necessarily narrow, we do not think that this still also should be applied as a protection to a citizen against treating a "private matter" as the place of activities to exercise its rights, or in the present case. *Thomas Jefferson Trust Co. v. Board of Trustees*, 25 III. App. 3d, 1971. And *v. Jackson Metal Co.*, supra, the was related necessarily individuals in which it works.

The judgment of the circuit court is affirmed.

AFFIRMED.

Barrett and Burrell, JJ., concur.

97 - 27647

GENERAL MOTORS ACCEPTANCE CORPORATION, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
RHODES GARAGE COMPANY, a corporation, Appellee.	

225 I.A. 659

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 9, 1921, plaintiff (appellant) commenced an action in replevin in the Municipal Court of Chicago to recover the possession of a certain automobile described as "one 1920 Oldsmobile, Model 45, serial number 4480." In the affidavit it is alleged that plaintiff is lawfully entitled to the possession of the automobile, and that on May 6, 1921, the Rhodes Garage Company, defendant, wrongfully took and wrongfully detains the same. The bailiff took it under the writ and delivered it to plaintiff. After a trial without a jury the court found that the right to the possession of the automobile was not in the plaintiff, and, on June 21, 1921, entered judgment in favor of defendant and directed that a writ of retorno habendo issue. This appeal followed.

The facts as disclosed from the evidence are in substance as follows: On April 6, 1920, one G. W. Trump of Sterling, Illinois, and there doing business under the name of the Superior Motor Car Co., sold and delivered to one Leonard Jones of the same place the automobile in question. As a part of the purchase price Jones gave Trump his promissory note for $1260, dated April 6, 1920, payable in installments of $126 per month for 10 months. The payee was the Superior Motor Car Co., the name under which Trump conducted his business. To secure the note Jones on the same day executed a chattel mortgage on the automobile and the mortgage was subsequently recorded. Trump, in the name of the Superior Motor

Car Co., endorsed the note and assigned the mortgage to plaintiff. Jones made the monthly payments due on the note up to and including December, 1920. He did not pay the 9th and 10th installments due on January 6 and February 6, 1921, respectively. On January 26, 1921, Jones surrendered the automobile to Trump, the original mortgagee, and received in exchange a certain automobile truck, and Trump agreed to pay to plaintiff the two unpaid installments on the note, and, as Jones (plaintiff's witness) testified, "clean it up." Pursuant to this agreement Trump came to Chicago prior to February 6, 1921, called on plaintiff and informed Osborne, its credit man, of his transaction with Jones and that he (Trump) had received back from Jones the automobile and would pay plaintiff the two remaining installments due on the note. Osborne, plaintiff's witness, testified that the arrangement as outlined by Trump was "satisfactory" to plaintiff. On or about March 26, 1921, Trump drove the automobile to Chicago and there sold and delivered it, together with two other automobiles, to the American Auto Sales Co. On March 31, 1921, the automobile in question was taken from said Auto Sales Co. by the bailiff of said Municipal Court in a replevin action instituted by the First National Bank of Sterling, Illinois, which action was subsequently dismissed by the bank, the bailiff placing the automobile for safe keeping in defendant's garage where it was again taken by the bailiff under the replevin writ in the instant case and before it had been returned to the Auto Sales Co. Trump did not pay plaintiff the two installments due on the Jones note as he had agreed to do, - the last of which matured on February 6, 1921.

Under the facts as above outlined we are of the opinion that plaintiff, at the time of the commencement of the present replevin action, May 9, 1921, did not have the right to the possession of the automobile and that the judgment appealed from

should not be disturbed. It is elementary that a plaintiff in replevin must prevail, if at all, on the strength of his own title. It appears that, after the Jones note and the chattel mortgage on the automobile securing it had been transferred to plaintiff by Trump, Jones surrendered the automobile to Trump, the payee of the note and original mortgagee, and it was agreed between them that Jones should not pay the two remaining installments due on the note and that Trump should pay them to plaintiff. It further appears that plaintiff was at once advised of this arrangement, sanctioned it, and in effect agreed that it would look to only Trump for such payments. We think that these acts of the interested parties had the effect in law of releasing the lien of the chattel mortgage on the automobile and that when the American Auto Sales Co. purchased it from Trump that company obtained a good title to it. The Jones note, secured by the chattel mortgage and having been assigned by the payee, Trump, to plaintiff, was, under the circumstances, subject to the defenses existing between said payee and Jones, the payor, the same as if the note was held by said payee. (Cahill's Stat., Chap. 95, Sec. 27; J. & A. Stat. Sec. 7602.) Furthermore, even assuming that the lien of the chattel mortgage had not been released for the reasons above stated, plaintiff did not make any attempts to take possession of the automobile within a reasonable time after February 6, 1921, the day when the last installment on the note became due and which was not paid. (Highley v. Childs, 114 Ill. App. 173, 176.) Plaintiff knowingly permitted the automobile to remain in the possession of Trump and made no effort to get possession of it until after it had been sold by Trump on or about March 26, 1921, to the American Auto Sales Co.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Merrill, JJ., concur.

2-1/2

117 - 27067

DENNIS McCARTHY, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
	COOK COUNTY.
WEST TOWN MARKET COMPANY, a corporation, Appellant.	

225 I.A. 659

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Defendant (appellant) seeks by this appeal to reverse a judgment for $5,000 rendered against it on April 30, 1921, after verdict, by the Circuit Court of Cook County in an action for damages for personal injuries received by plaintiff about 9 o'clock on the morning of November 21, 1918, on West Madison street at or near the intersection of Albany avenue in the city of Chicago, by being struck by defendant's auto-truck, east-bound on West Madison street. The district where the accident occurred is a closely built up business district.

Plaintiff's amended declaration consisted of five counts. The first charged general negligence in the operation of the automobile; the second that the automobile was negligently driven at an excessive and dangerous rate of speed; the third that defendant negligently failed to blow a horn or give any warning of the approach of the automobile; and the fourth that the defendant negligently drove the automobile at a speed in excess of 10 miles per hour in a closely built up business district of the city. During the trial the fifth count was withdrawn. Defendant filed a plea of the general issue, and a special plea that at and just before the happening of the accident it did not operate or control the automobile by any of its servants, and that the automobile was not then being operated for or in its behalf.

Plaintiff was a police officer, then wearing civilian clothes and assigned to duty in the chief's office, and was about

58 years of age. He had been connected with the police department of the city for over 30 years. On the morning in question he left a store, located on the south side of Madison street and west of Albany avenue, and walked east to the corner and started to cross Madison street. As he stepped off the curb he saw defendant's truck coming east on Madison street, travelling in the south or east bound street car track, and then more than 100 feet away from him. He walked to a point about midway between the curb and the south rail of said street car track and stopped to allow the truck to pass in front of him. About this time the truck, with no material decrease in its speed, left the track and came directly towards plaintiff, who, thinking that he did not have time to return to the sidewalk and that the truck would pass behind him, stepped north, and the truck, turning north about the same time, struck him at a point between the east and west bound car tracks and knocked him down, rendering him unconscious for a time, and causing the severe and permanent injuries complained of. The testimony was conflicting as to the speed of the truck at and immediately before the time of the collision, plaintiff testifying that it was going at the rate of more than 20 miles per hour, and the driver of the truck testifying that when he first saw plaintiff, about 75 feet away, its speed was about 15 miles per hour, that he put on the brakes "a little," that he judged that he "could get by him," that when the collision occurred the truck was running "probably 13 miles per hour," and that after the collision he stopped it in about 15 feet and as quickly as he could. It does not appear that the driver, when he saw plaintiff in a place of danger, made proper attempts to stop the truck in time to avoid the collision as he could have done. He testified: "I was driving probably 15 miles an hour, when I seen a man in the street, as though he was going to cross; he looked at me and I looked at him; he kept looking at me; I kept looking at him; he

[illegible] years of age. He had been connected with the motor industry-
[illegible] of the city for over 30 years. On the morning in question
he left a store, located on the north side of Bedford street and
west of Albany avenue, and walked east to the corner and stepped
to cross Bedford street. As he stepped off the curb he saw
definitely that coming east on Bedford street, travelling in
the south or south bound street car track, and then came from his
left and from him. He walked to a point about midway between
the curb and the south rail of said street car track and attempted
to allow the truck to pass in front of him. Just this he
[illegible], with no material deviation in his speed, left the track
and veer directly towards plaintiff, who, thinking he had
had ample time to return to the sidewalk and let the truck pass
[illegible] behind him, stopped short, and his foot, leaning [illegible]
[illegible] the same time, struck him at a point between the rear and
[illegible] of the truck, overturning him [illegible]
[illegible] for a time, and causing him severe and permanent injuries
[illegible]. The testimony [illegible] in the world of
the truck at and immediately before the time of the collision,
[illegible] testifying that it was going at the rate of more than 3
miles per hour, and the driver of the truck testifying that when
he first saw plaintiff, about 75 feet away, his speed was about 12
miles per hour, that he put on the brakes "a little," that he
judged that he "would get by him," and that when the collision occurred
the truck was running "probably 15 miles per hour," and that after
the collision he stopped it in about 15 feet and at twenty or
[illegible] feet. It does not appear that the driver, when he saw plaintiff
in a place of danger, made proper attempts to stop the truck in
time to avoid the collision or to avoid some damage. On cross-
[illegible] examination he stated on the south side of Bedford
street, as though he was going in every; he looked at me and I
looked at him; he kept looking at me; I kept looking at him;

started to cross the street, looked again and came back; this time I was in neutral, my foot on the brake; he commenced to cross again; I had plenty of time to turn around him; he went by the third time and came the fourth time; the fourth time he stopped right in front of the car; I managed to turn so that only the fender got him."

Counsel for defendant here contend that plaintiff cannot recover because of his contributory negligence. After a careful review of the facts and circumstances disclosed by the evidence we cannot agree with the contention.

Counsel also contend that the declaration is insufficient to sustain the judgment in that in none of the four counts upon which the case was tried are there any express averments that defendant owed any duty to plaintiff. While this is so, each count in our opinion avers such a state of facts that the duty of the defendant to the plaintiff clearly appears, and this is sufficient. (Ramsay v. Tuthill Material Co., 295 Ill. 395, 398.)

Counsel further contend that the verdict of $5,000 is excessive and disclosed passion and prejudice on the part of the jury. As a result of the collision plaintiff's chin was cut and his back injured, and he suffered a serious fracture of the larger bone of the lower left leg near the knee. He was taken to a hospital where he remained four weeks, during which time he suffered much pain and was under the care of physicians. He was then taken to his home and received further medical treatment. His knee was kept in a cast for several months and he did not return to work until May 1, 1919. In February 1920, he was assigned to travel a beat, but found that because of his injured leg he was unable to perform the duties of a patrolman and subsequently resigned his position. At the time of the trial he testified that he was obliged to drag his leg while going up or down stairs, and that ofttimes he still had pain in the leg. Two physicians testified that there was a limitation of motion of the leg and a deformity at the knee joint,

and that said limitation and deformity were permanent. We are unable to say that the verdict is excessive. (Grossman v. Cosgrove, 75 Ill. App. 385, 386.)

Counsel further contend that the judgment cannot stand because at the time of the accident McGuire, the driver of the truck, was not acting within the scope of his employment or in the furtherance of the business of the defendant. One Melleville, another employee of defendant, was rising with McGuire on the truck. They were going down town for the purpose of getting a chauffeur's license for Melleville in order that he might thereafter act as a driver of one of defendant's trucks. For several weeks prior to the accident McGuire, by direction of defendant, had been "breaking in" Melleville as a chauffeur, and the latter had become sufficiently proficient, in McGuire's opinion, to drive a truck. The evidence was conflicting on the issue whether or not at the time of the accident both of these employees were engaged in or about defendant's business, and whether or not defendant's president had directed them on that particular morning to go and get a license for Melleville, but it is undisputed that McGuire had general authority to drive the truck at any time for defendant's benefit or in connection with its business without asking special permission, and that the accident happened during the customary working hours of both McGuire and Melleville, for which time they were being paid by defendant. We think that the question raised by defendant's special plea was one for the jury to decide under the evidence. (Swanoutt v. E. V. Trout Auto Livery Co., 178 Ill. App. 606, 611; Di Marco v. Chicago & Riverdale Lumber Co., 220 Ill. App. 354, 361.) Indeed, the defendant by one of its offered instructions, which the court gave, asked the jury to decide this issue, and by their verdict they decided it adversely to defendant, and we think properly.

and that paid liability and authority were necessary. In any events we say that the verdict is excessive. (Emphasis v. Chesapeake, 75 III. App. 188, 194.)

Counsel further argues that the Illinois Central issue between at the time of the accident Schmidt, the driver of the truck, was not acting within the scope of his employment or in the furtherance of the business of the defendant. The testimony, however conflicting of defendant, was clearly with regard to the truck. They were going down town for the purpose of getting a cheeseburger's (during the evidence is some doubt as to which truck after out as a driver of one of defendant's trucks. The accident occurred prior to the accident Schmidt, by direction of defendant, had been "working in" Schmidt's truck, and the latter had been unfamiliarly practicing, in Schmidt's opinion, he drive a truck. The evidence was conflicting as the time whether or not at the time of the accident both of these employees were engaged in the Illinois Central's business, and whether or not defendant's permission to operate them on that particular occasion is and not a license for liability. But it is undisputed that Schmidt had general authority to drive his truck at any time for defendant's benefit or in connection with the business without asking special permission, and that the accident happened during the customary working hours of both Schmidt and Wainwright, for which time they were being paid by defendant. We think that the question raised by defendant's special plea was not for the jury to decide under the evidence. (Lundberg v. C. B. Steel Drop Hatch Co., 171 Ill. App. 664, 671; Ed Green v. Chicago & City Cab Co., 208 Ill. App. 184, 187.) Indeed, the testimony by one of his officers instructions, which the court gave, asked the jury to decide this issue, and by their verdict they decided it correctly in defendant, and we think properly.

Counsel further contend that the court erred in giving certain instructions offered by plaintiff and in refusing three instructions offered by defendant. We have examined the given instructions referred to and do not think that the court committed prejudicial error in giving them. The jury were fully and fairly instructed. Fifteen instructions offered by defendant were given by the court, and the refused instructions referred to were, we think, properly refused.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

243 Ill

127 - 27077

FRANK MLADICH,
Appellee,

vs.

THOMAS McNEELY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 659

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $250 rendered after verdict against defendant by the Municipal Court of Chicago in an action for damages for the alleged breach of a contract for the sale of certain real estate situated in Chicago, Cook County, Illinois. No brief has been filed in this appellate court by appellee (plaintiff).

The action was commenced on September 11, 1919. In plaintiff's amended statement of claim, filed November 3, 1917, it is alleged in substance that on July 7, 1917, plaintiff agreed to buy and defendant agreed to sell the premises in question for the sum of $1550; that plaintiff agreed to pay for examination of abstract and preparation of deed, and to deposit in escrow on account the sum of $250, which sum was to be applied on the purchase price when the abstract was examined and found merchantable, and further agreed to pay the balance of $1300 on delivery of deed; that defendant agreed to furnish an abstract brought down to date and a good and merchantable title to the premises; that the parties went together to the office of Harry C. Lemon, where plaintiff handed said Lemon $250 to be held by him in escrow, and defendant handed him an incomplete abstract and asked him to have the Chicago Title & Trust Co. bring the same down to date; that the parties asked said Lemon to draft a memorandum of the agreement, which he did and handed to each

party a copy as follows: "Chicago, July 7, 1917. Received of Frank Mladich the sum of $250 to be applied on the payment of $1550 for property known as" (Here follows description of the property) "to Thomas McNeely as soon as abstract is examined and passed, balance of purchase price to be paid when the deed is passed. H. C. Lecmon."; that on July 26, 1917, defendant asked plaintiff for a payment on account and plaintiff handed defendant $50, which defendant credited on the written memorandum as follows: "July 26-17. By cash 250. Thomas McNeely."; that thereafter defendant recovered his abstract from the Chicago Title & Trust Co., but refused to have same brought down to date, and refused to furnish a signed deed, and informed plaintiff that he would not comply with his contract; that defendant returned to plaintiff a post office money order for the 200 paid him on July 26, 1917, which plaintiff holds subject to defendant's orders; that notwithstanding plaintiff has at all times been ready, willing and able to carry out all the terms of his contract, and has offered to do so, defendant has refused to go on with his contract, to plaintiff's damages in the sum of $1001.

On November 28, 1917, on defendant's motion, the court struck from the files plaintiff's said amended statement of claim, and dismissed the suit at plaintiff's costs. From this judgment plaintiff appealed, and on November 6, 1918, the 2nd branch appellate court for this district reversed the judgment and remanded the cause. (Mladich v. McNeely, 212 Ill. App. 435.) In its opinion the 2nd branch court held in substance that the trial court erred in striking from the files plaintiff's amended statement of claim because the memorandum set forth therein sufficiently fulfilled the requirements of the statute of frauds.

After the remanding order had been filed and the cause reinstated in the Municipal Court, defendant, on February 25, 1921, filed an affidavit of merits in which he denied entering

Daily's story as follows: "Chicago, July 9, 1917. Received at Fisk Building the sum of $100 to be applied on the payment of $2000 for property known as 'Lone Tailors' investigation of the society.[1] 'A Tamed Lobster' on news as district is examined and secured, balance of purchase price to be paid when the case is ready. X. C. Lemmon."; Idem on July 16, 1917, stenographer wrote plaintiff for a product on accounts and plaintiff handed defendant $50, which defendant credited on the written memorandum of [illegible] Daily 'B-17'. By such [illegible] 'Tamed Lobster-Daily'; that defendant recovered his interest from the Chicago Tribune's [illegible]. Not refused to have some [illegible] done to date, and refused to furnish a signed [illegible], and informed plaintiff that he would not [illegible] the [illegible] Daily interest [illegible] in [illegible] 1917, [illegible] plaintiff has at all times been ready, willing and able to carry out all the terms of the contract, and has offered to do so, defendant has refused to go on with his contract, to plaintiff's damage in the sum of $2000.

On December 10, 1917, on defendant's motion, the court admonished from the filed plaintiff's sole amended statement of claim, and dismissed the suit at plaintiff's costs. From this judgment plaintiff appealed, and on December 1, 1920, the 1st District appellate court for this district reversed the judgment and remanded the cause. (Fields v. Lemmon, 211 Ill. App. 1.) In his written opinion the 1st branch court said in substance that the trial court erred in excluding from the filed plaintiff's amended statement of claim between the proceedings and facts therein contained, including the requirements of the statute of frauds.

After the remandment order had been filed and the cause reinstated in the municipal court, defendant, on February 10, 1921, filed an affidavit of merits in which he denied material

into any definite agreement with plaintiff on July 7, 1917, to sell the premises in question, and alleged that whatever negotiations took place about that time were merely preliminary to the drafting and signing of a regular form of a real estate contract. Defendant further alleged in substance that afterwards the parties had further negotiations as to the entering into a more formal real estate contract, but that they were unable to agree as to certain terms and conditions; that because of this and because of the unreasonable delay in completing the deal, defendant subsequently declared the deal off and returned the $50 to plaintiff, which the latter accepted; that the said sum of $250, mentioned in said receipt, was never turned over to defendant; that no tender of the purchase price mentioned in said receipt was ever made to him; and that said receipt by its express terms was made conditional upon the passing of the title to the premises by plaintiff.

The cause was tried before a jury. The evidence tended to support the allegations contained in defendant's affidavit of merits as to the negotiations and happenings after the execution of said receipt on July 7, 1917, and defendant's endorsement thereon of July 26, 1917. It appeared that the parties were unable to agree as to certain terms and conditions; that because of delay in the negotiations defendant declared the deal off and returned the $50 (which on July 26, 1917, he had received from plaintiff) to plaintiff and that plaintiff accepted the same, that defendant never received any portion of the $250, which plaintiff placed in Leemon's hands on July 7, 1917, and that said sum was received back by plaintiff; that the title was never passed by plaintiff; and that no tender of the full purchase price of $1550 was ever made by plaintiff to defendant prior to the time defendant elected to declare the deal off.

Counsel for defendant contend in substance that the

judgment is erroneous for the reasons that (1) there was no meeting of the minds of the parties as to all the terms and conditions of the proposed sale; (2) that if the receipt of July 7, 1917, with the subsequent endorsement of defendant thereon be treated as a contract, it is lacking in mutuality because plaintiff did not bind himself to perform unless he should pass the title to the premises; and (3) that the contract being conditional upon plaintiff passing the title, defendant had a right to withdraw his offer to sell before a tender of the full purchase price was made by plaintiff. We think there is merit in all three contentions. The second contention is supported by the cases of Belton v. Muling, 195 Ill. 384, 392; Friendly v. Elwert, 57 Ore. 599, 603; and the third contention by the case of Carseran v. White, 117 Ill. 118, 122. In our opinion the judgment should be reversed with a finding of facts, and it is so ordered.

REVERSED WITH A FINDING OF FACTS.

Barnes and Morrill, JJ., concur.

127 - 27077

FINDING OF FACTS.

We find as facts in this case that the minds of the parties did not meet as to all the terms and conditions of the proposed contract of sale of the premises, and that defendant withdrew his offer to sell the premises to plaintiff at the price of $1500, before plaintiff had passed the title and before he had tendered to defendant the amount of said purchase price.

209 - 27162

DR. LESTER E. BOWER,
Appellant,

vs.

E. JOHNSON,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 659

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant sued to recover a fee for professional services rendered as a physician to defendant's daughter at defendant's request. He made proof that the usual, reasonable and customary fee for such services was $160. There was no proof to the contrary. Defendant and his daughter testified as to the services performed, as to which there was no particular controversy, but defendant offered no proof as to their value. The court undertook to decide the matter on his own experiences and rendered a judgment for $43. It is unnecessary at this stage of development of our judicial proceedings to say the court has no right to draw on his experiences in matters of which he can not take judicial notice and place them against the undisputed evidence of the case. Accordingly the judgment will be reversed with a finding of facts according to the evidence.

REVERSED WITH A FINDING OF FACTS.

Mr. Presiding Justice Gridley concurs.

Mr. Justice Morrill took no part in this case.

209 - 27162 FINDING OF FACTS.

We find that appellant, Dr. Lester E. Bower, rendered professional services for appellee, N. Johnson, and that the usual, reasonable and customary fee therefor is $100, and that no part thereof has been paid to appellant.

220 - 27177

ROBERT F. NASH,
Appellee,

vs.

JOHN RYDBECK et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

225 I.A. 660

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought against appellants to recover certain premises described in an agreement between appellee and said appellants, which was the only evidence offered by plaintiff to sustain his right of action. We need not consider whether the agreement was a lease which gave appellee a right to possession of the premises on May 1, 1921, as he claimed, or whether it was a mere agreement for a lease, for, regardless of its character, the action could not be sustained without further proof, it being indispensable to plaintiff's right to maintain the suit that defendants' possession be shown and a refusal to surrender it on demand. (Hersey v. Fastover, 11 Ill. App. 197; Preston v. Davis, 112 id. 636; McCluskey v. Nelson, 179 id. 182; Dodair's Exhair v. Case, 220 id. 348.) There being no such proof in this case the evidence, therefore, was insufficient in law to sustain the judgment. It will accordingly be reversed.

REVERSED.

Gridley, P. J., and Merrill, J., concur.

331 - 27190

GEORGE FINSELBER et al.,
trading as Republic Cigar Co.,

Appellees,

vs.

PREFERRED HAVANA TOBACCO COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

325 I.A. 660[2]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $1,000 entered upon a verdict in an action of assumpsit in which appellees, trading as Republic Cigar Company, a partnership, claimed it sold and delivered certain cigars to appellant, on which issue was duly taken.

The controlling question is whether the verdict and judgment were against the weight of the evidence.

Appellant is a foreign corporation engaged in the manufacture and sale of its own cigars. January 28, 1917, it made a written agreement with Walter Tobin, who maintained and conducted a cigar stand in Chicago for retailing cigars, to furnish him a line of its cigars on consignment. Tobin was to render an account of the stock on hand and remit for sales every two weeks. In December, 1918, he was in arrears on his remittances, when a settlement was had, Tobin giving notes in payment for the consigned merchandise he had sold and not paid for. Appellant and Tobin then entered into another like written contract under which their relations continued until July, 1919, appellant in the meantime sending goods on consignment and Tobin occasional remittances. Early in the year 1919 appellees, through George Finselber, called on Tobin and sold him a line of cigars, and continued to sell and bill to him until July, 1919, when he

became insolvent, owing appellees about $1,000, and appellant $9,000 on consigned merchandise, and a balance on his notes given in December, 1918. Although appellees claimed at the trial that they understood that their sales to Tobin were in reality for appellant they nevertheless brought an attachment suit against Tobin for the amount of their claim, whereupon Tobin's creditors filed a petition in bankruptcy against him which resulted in the dissolution of the attachment and settlement of the creditors' claim in the bankruptcy court. Thereafter appellees brought this suit on the theory that the obligation was appellant's and not Tobin's.

Notwithstanding its previous inconsistent attitude in attaching the cigar stand, as Tobin's property, appellees claimed at the trial, on very unsatisfactory evidence, that there was another written agreement between appellant and Tobin whereby he was to conduct the cigar stand for appellant upon salary, and that such agreement was subsequently destroyed.

The evidence consisted mainly of alleged admissions which were specifically denied, and that appellees' representative at the time the bailiff sought to make a levy under the attachment read to him a contract which provided for such salary. The existence of such a contract was expressly denied both by Tobin and appellant's representative. Appellant's witnesses testified that in support of their protest against said levy the contract read was the contract for consignment. Appellees witnesses did not read or see the contract so read and it may be readily inferred that they misapprehended its import from merely hearing it ~~XXXXXX~~ read. The cigar stand was leased to Tobin; he paid the rent therefor, kept his bank account in his own name, checked from it in paying his creditors, remitted to appellant at the wholesale prices according to which the goods were billed to him, and went through bankruptcy, paying a small dividend to his

Between September, which equalizes about $2,000, and December $7,000 on consigned merchandise, and a balance on the note, given in December, 1922. Although operations closed at the total loss they had anticipated, their sales in total were so heavily for cash, merchandise sales equaled total for the amount of their stock, showing Rudolf's principal fault a partiality in buyers against the wishes. Persist in the elimination of the efficiency and willingness of the practical claim in the bookkeeping years. Therefore expensive thought this just as the labor-saving for efficiency and merchandisers and his trials.

Notwithstanding its previous Commercial activity in attaching the right which, as Tudor's property, appliance claims at the title, to very considerably-itself, that have the author written alternate between initial and this thereby be was to produce the right which for equipment with value, and that much increased was miscellaneous difficulties.

The rights assistant usually of effect additions which are practically-tested, and that commercial representative at the time the Bailey enough to make a trip among the customers trial to the a number which principal for what making. The difference of such a months was especially tested very by which and equipment's representative. Equipment's commercial title that in manners of their product customer such day the activity was the machine for equipment. Equipment activity, all but read or not the machine in read and is may to result. Believed that they manufacturing are lumber's trade/merely is BARRIX trad. The right plant not lumber in Trade; to what the year Corporation, may all back through in his was that, claimed from it in Judge his machinery, resulted to equipment of the machinale prices -merely, in which the price-year filled in the, and was through Commercial, means a small claimed to his

creditors. There was no evidence of payment of any salary to him or of any allowance therefor in his accounting with appellant. If appellees understood that Tobin was a mere agent for appellant it is difficult to understand why they did not bring their attachment suit against appellant. That they did not is inconsistent with bringing the suit against Tobin. Nor is it apparent why appellant, engaged as it was in manufacturing cigars at wholesale prices, should need or want to buy that class of goods from others. Tobin was buying cigars from several dealers. We think the undisputed facts are inconsistent with plaintiffs' theory of the case, and that the verdict was against the manifest weight of the evidence. The judgment entered thereon should be reversed with a finding of fact that appellees did not sell or deliver the goods in question to appellant.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

2436

240 - 27197

ALEXANDER KOSEN,
Appellee,

vs.

DAVID MONAHAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 660

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action in replevin to obtain possession of an auto-truck, and included a charge of trover. Plaintiff claimed possession by virtue of purchasing the truck at a foreclosure sale had under a chattel mortgage upon it. Defendant, who operated a garage, claimed the right to retain possession of it by virtue of a common law lien for repairs he had made upon it. The court found that defendant converted the property, that its value was $400, and entered judgment for that sum.

Without proof of a demand, or of a justifiable excuse for not making it, replevin would not lie; and without proof of conversion, of course, trover would not lie. There was no proof of a demand or facts excusing it, and the only evidence of conversion was defendant's retention and apparent concealment of the property. As the evidence tended to show that the truck came lawfully into defendant's possession, and that he had made repairs thereon for which he had not been paid, and that he still held possession of the same at the time of the foreclosure sale, and claimed a common law lien thereon for making such repairs, he had the right to such possession until his common law lien was satisfied.

Hence under such circumstances the evidence showed insufficient proof to sustain a judgment in trover, and accordingly the judgment will be reversed.

REVERSED.

Gridley, P. J., and Merrill, J., concur.

349 - 27907

U. F. SMYTH, administrator of the estate of FRANCES McNEANEY, deceased, Appellee, vs. CHARLES E. FARGO et al., Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from an order, entered May 21, 1921, on the motion of appellee, plaintiff below, vacating and setting aside an order entered December 1, 1920, dismissing this cause for want of prosecution. The motion is predicated on the misprision of the clerk in erroneously entitling the case as "Smuth, Admr. v. Fargo, et al.," on both the printed calendar of the trial court and the judge's docket or trial call of cases. The fact of such misprision is not questioned.

It appears that appellee's attorney consulted the trial call as so made by the clerk for December 1, 1920, and not recognizing his case by such title, did not attend the call, in consequence of which the case was dismissed.

It is urged he was not diligent. It is true that exercising the highest degree of diligence - which would not be required in such a matter - he probably would have identified his case by its general number or the similarity of names. It is also true that one, though exercising ordinary diligence, might be misled by a wrong, though similar, title of his case.

Both he and the court might properly have assumed that the clerk in performing his duties under section 19 of the Practice Act, would give the case the correct title on the docket and the copy furnished for the use of the

on the docket and the copy furnished for the use of the

court, and also on the calendar which he was required by rule of court to prepare. The court presumably acted upon such assumption, for in its minutes of the order of dismissal it entitled the case according to the clerk's erroneous designation. Hence we think it was a clear case of entering an order under misapprehension of the true state of facts, which probably would not otherwise have been entered, and was such an error of fact as gave the court jurisdiction, under section 89, to enter the order appealed from, it also appearing that appellee had a meritorious cause of action and exercised due diligence.

While the order prepared and spread upon the records by the clerk contained the correct names of the parties of the suit, his ministerial act in that respect did not change the state of facts under which the court directed the order.

Accordingly the order appealed from will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

270 - 27228

STANLEY F. BLUM COMPANY,
a corporation,
Appellee,

vs.

OBERFELD BROTHERS COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

223 I.A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, sued for a balance claimed to be due for goods, etc., sold and delivered to defendant, the appellant. Issues of fact were ultimately formed both upon the statement of claim and a set-off filed thereto by defendant. More than a year afterwards a jury was called and sworn. Without introducing any evidence, and without withdrawing its reply to the set-off, which unquestionably tendered issues of fact thereon, plaintiff moved "to exclude all evidence under the set-off." The motion was allowed. Thereupon, without introducing any evidence and with issues of fact raised both as to plaintiff's claim and defendant's set-off, which stood undisposed of, the court sustained another motion of plaintiff to direct a verdict finding the issues against defendant both on plaintiff's statement of claim and defendant's set-off, and instructed the jury to assess plaintiff's damages at $437.54, being the balance claimed in the statement of claim.

It is difficult to conceive of a more irregular course of procedure and disregard of fundamental principles. As the record stands there was a directed verdict on the merits of plaintiff's claim without evidence heard on issues of fact that were tendered and remained undisposed of, but also on the set-off itself after it had been stricken. While the forms of common law pleadings are not required to be followed in the Municipal Court the fundamental principles under which issues of fact are determined

still obtain.

The statement of claim merely alleged that defendant was indebted in such sum for balance due on goods, etc. sold and delivered by plaintiff to defendant at an agreed price, amounting to $1574.88, on which credit was allowed of $1137.34, leaving the balance claimed. It gave defendant no real information as to the nature of plaintiff's claim. After defendant had filed two affidavits of merits, which were stricken, he made a motion for a more specific statement of plaintiff's claim, which was denied. Ultimately an amended affidavit of merits and a set-off were permitted to stand, which were substantially in the same language. Plaintiff then filed what is called an affidavit of merits to the set-off. It pleaded excuses for non-delivery of goods as set up in defendant's affidavit of merits and tendered issues to the statement of set-off which could only be determined by a trial. These pleadings covered about a dozen printed pages. We deem it unnecessary to set them out at length. As stated, plaintiff's statement of claim was as general as that in the common counts for goods sold and delivered at defendant's request. The affidavit of merits and the affidavit of set-off set up a state of facts showing that all of plaintiff's obligations were to be fulfilled before defendant was required to make payment, and that plaintiff had delivered only a small portion of the merchandise and refused to complete deliveries because it would lose money in so doing, the market value of the merchandise in the meantime having materially increased, by reason of which non-delivery and plaintiff's breach of contract defendant claimed a set-off of damages exceeding the amount credited to it by plaintiff of $774.96. To the set-off plaintiff pleaded that defendant's alleged damages grew out of separate transactions, that for a valuable consideration the contract was cancelled, that defendant refused to accept a large portion of the order, that the value of the goods ordered had not

greatly increased, that plaintiff did not refuse or neglect to deliver the goods until defendant refused to pay for merchandise previously delivered, and other matters either raising a question of fact directly or by confession and avoidance. It is very clear that these issues could not be disposed of on a mere motion.

But treating plaintiff's motion to strike the set-off as in the nature of a demurrer, it admitted the allegation in the statement of set-off that plaintiff refused to deliver on account of loss or an increase in the value of merchandise. His admission on this allegation therefore estopped him from setting up a different ground for non-delivery. (I. C. R. R. Co. v. Reitz, 214 Ill. 350; 21 Corpus Juris, p. 1222.)

Defendant's affidavit of merits and affidavit of set-off show that the claim for damages arose out of the contract sued on. In such a case there can be no question that the defendant would have the right to reduce the claim of plaintiff by showing the damage sustained by him for plaintiff's failure to fulfill his contract. (Richards v. Shaw, 67 Ill. 222; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 84.) And in this State the fact that damages are unliquidated is no obstacle to setting them off when they accrue out of the same subject matter as the demand against which they are offered. (Sargeant v. Kellogg, 6 Gill. 273; Hartshorn v. Kingman, 16 Ill. App. 556; Scudder-Gale Grocer Co. v. Russell, 65 Ill. App. 281; Holman v. McKennan, 130 Ill. App. 320.) Inasmuch, therefore, as defendant's affidavit of merits presented a complete defense to plaintiff's action, and the statement of set-off a good and sufficient statement of the cause of action on behalf of defendant, and as plaintiff himself tendered issues of fact on the latter, it was error on the part of the court not to hear evidence on the case and submit the cause to a jury for a determination of the issues of fact.

Plaintiff cites authorities where the vendor is held to

be relieved from delivering merchandise due after the purchaser's default, and that the purchaser in such a case cannot recover damages accruing to him after such default. These authorities are not applicable to the facts set up by the defense, which are to the effect plaintiff was first guilty of a breach of contract. Accordingly the judgment will be reversed and the cause remanded with directions to try the issues of fact presented by the pleadings.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

204 - 27252

MARY JANE O'ROURKE, a minor, by Thomas A. O'Rourke, her Next Friend,

Appellee,

vs.

MARSHALL FIELD & CO., a Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

225 I.A. 661

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action on the case for personal injuries, brought by a minor by her next friend, against appellant corporation. The declaration sets up, among other material facts, that in the building conducted by appellant as a store was a play room or recreation room for children, conducted by defendant, for their amusement, entertainment, etc., and that the minor was there at appellant's invitation, and that appellant wrongfully allowed and permitted a rocking horse, on which the child was riding in said room, to become defective, etc., whereby the child was caused to fall and be thrown from said rocking horse to the floor and injured. The jury assessed plaintiff's damages at $1,000. A remittitur of $700 was taken and then withdrawn on defendant indicating its purpose to appeal, whereupon the judgment was entered on the verdict.

Appellant argues that the allegation that the minor was there "at the invitation of the defendant in said play room" called for proof of an express invitation. In this we do not concur. While there was no competent proof of an express invitation, yet in view of the state of the pleadings alleging that defendant conducted and maintained such a play room for the public, of which there was no special denial, an invitation to use it would be implied. That being the case the rule invoked by appellant which

relieves a private owner from any duty to a licensee except to refrain from actual, wilful injury towards him is not applicable.

It is next urged that there was no proof of defendant's negligence. The evidence shows that while the child was rocking on the rocking horse the handle or "screw" which, in the course of the rocking she took hold of, became detached from the horse, causing her to fall backwards on the floor. There was also evidence tending to show that defendant had a servant in attendance. Defendant put in no proof denying or respecting the maintenance of the room. Taking, therefore, the admissions of the pleadings, and the fact that children of such tender years are incapable of exercising due care for themselves, and that plaintiff had an attendant present, probably for that reason, we think the fact that the handle, which the child was supposed to take hold of to hold herself on the rocking horse, became detached while she was so rocking, established a prima facie case of negligence. To be sure, the evidence on this subject was meager. But we think it follows from such state of the record that defendant would be expected to maintain appliances reasonably safe for the purpose for which their use was invited, and therefore was required to exercise ordinary care to see that the handle on the rocking horse, on which safety of the child in using the horse apparently depended, was reasonably secure.

But the judgment was excessive. Counsel for appellee himself was disposed to accept the trial Judge's conclusion to that effect. The only permanent injury from the accident was a scar resulting from sewing up a laceration about three-quarters of an inch long in the fold of the eyelid which is scarcely visible, the other consequences being temporary and not serious.

If plaintiff will remit $650 the judgment will be affirmed, otherwise it will be reversed and the cause remanded.

AFFIRMED OR REMITTITUR.

Gridley, P. J., and Morrill, J., concur.

306 - 27264

PEOPLE ex rel. JAMES LYNCH,
Appellee,

vs.

VILLAGE OF ELMWOOD PARK et al.,
ON APPEAL OF A. H. BRACHER et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

225 I.A. 661 3

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order awarding a writ of mandamus, and directing the president, clerk and trustees of the Village of Elmwood Park to proceed and appoint officers to fill certain offices that had been duly created by ordinance of said village. One of the appellants stood by his overruled demurrer to the petition, and the other three filed an answer thereto. As the answers presented no traversable facts, and thus practically admit the overments of the petition, no evidence was heard and the order was entered on the pleadings.

It is contended the cause should have been submitted to a jury, but in view of the effect of such answers there was nothing for a jury to decide. While it would have been better practice on the part of petitioner to have raised the issue of law by demurrer, yet as the answer presented no issue of fact for a jury we think there was no error in entering the order, as aforesaid, on the pleadings.

The officers directed to be appointed are such as Article VI of the Cities and Villages Act prescribe may be appointed by the mayor with the advice and consent of the council. The same power and duties thus given to a mayor are also given to the president of a village. (Cahill's Stat. 1921, par. 1196.)

The provision of the order is that in proceeding to appoint and in appointing such officers the president and trustees shall act jointly, at a meeting of the board, "said president and each trustee having an equal right to nominate and vote" upon the nomination of persons to be appointed to such offices. It is urged that in this respect the order is erroneous because the president under the section of the statute last cited can vote only in case of a tie. We think the order will not be misconstrued, and that it contemplates nothing more than proceedings according to said Article VI. It will therefore be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

340 - 27298

LOUIS H. SIEGEL, trading as
L. SIEGEL & COMPANY,
Appellant,

vs.

DAVE GREENBERG, trading as
Green's Style Shop,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 661[4]

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant sued for the purchase price of three coats delivered to appellee on the latter's verbal order. The order was to duplicate a previous written order specifying style, color, size, etc. Appellee rejected the coats delivered under the verbal order, claiming they did not correspond to those ordered and received under the written order. Whether the color of the coats delivered under the verbal order was like the color of the coats delivered under the written order was the main issue. The case was heard without a jury. In determining that issue coats delivered under both orders were inspected and compared by the court, and the court found that there was a material difference in the color which justified appellee's rejection of the coats in question. The coats are not here for our inspection and hence the trial court's facilities for determining that question were superior to ours, and we cannot say from the evidence that the trial court reached a wrong conclusion.

Appellant contended that it was difficult, if not impossible, to obtain two bolts of cloth of precisely the same color. But if, as the court found, he undertook to duplicate the previous order the fact that he could not obtain a bolt of cloth of precisely like color would not excuse performance according to his undertaking.

The court having found from sufficient evidence that he did so undertake, and that the goods delivered thereunder did not conform in color to those delivered under the original order, the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

2442

361 - 27319

DENNIS J. HOGAN, Bailiff, etc.,
Appellant,

vs.

GEORGE SZABO et al.,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 662

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on a replevin bond in which the court found and assessed plaintiff's damages at $75.

Appellee Szabo replevied an automobile from Ganzler, for whose use this suit is brought. The former failed to prosecute the replevin suit with effect and a writ of *returno habendo* was issued for return of the property to Ganzler. It not having been returned this suit was brought.

There were two chattel mortgages on the automobile. Ganzler took possession under one, and Szabo replevied the automobile from him, claiming under the other which was a prior chattel mortgage. The amount due with interest on the note secured by the latter was $515. There was uncontradicted evidence that the automobile was worth at least $950. At such value it was sufficient to satisfy Szabo's claim and leave $435 towards satisfying Ganzler's. The $75 assessed as damages by the court was for attorneys' fees, incurred in the replevin suit. That this sum was reasonable was undisputed. Upon this state of facts it is not apparent why the court did not assess plaintiff's damages to include in addition to said attorneys' fees said sum of $435, making a total amount of $510.

While we do not think appellant's contention that Szabo did not have a valid prior lien on the automobile is well taken, yet Ganzler being entitled to the automobile under the writ of *returno*, or the value of the same, Szabo could not

contest his claim to the property, but could only claim in mitigation or reduction of damages what was due him under his prior lien, namely, $515. As said in Stevison et al. v. Barnett, 80 Ill. 513:

> "By permitting the suit to be dismissed he lost all right to contest the plaintiff's claim to the property except that saved to him by the statute, which was to plead and prove his title to the property in mitigation of damages. Beyond this he could not contest the plaintiff's title." (p. 519)

See also Bierman v. Columbia Typewriter Mfg. Co., 179 Ill. App. 69. We need not, therefore, discuss appellees' contentions which disregard this interpretation of the statute. Accordingly the judgment will be reversed and judgment entered here in favor of appellant for $510, with a finding that such was the amount of the damages.

REVERSED AND JUDGMENT HERE FOR $510.

Gridley, P. J., and Morrill, J., concur.

FINDING OF FACT.

We find that the amount of the damages suffered by appellant for failure of appellee George Szabo to return the automobile in question was $510.

391 - 27349

JOSEPH COHEN et al., Appellants, vs. L. J. KITE et al., Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants sued for a balance of $468 on shipments of merchandise to appellees, amounting in value to $2,072.72. The defense was accord and satisfaction, and that a portion of the goods were not according to sample and were returned. The case was tried before the court without a jury which decided for defendant, holding that the facts showed an accord and satisfaction.

Appellees returned a portion of the goods and sent appellants their check for $1,364.08 marked "payment in full of account to date," explaining in a letter transmitting the same that the goods were not according to sample. Appellants returned the check, and appellees sent it back again. It was then retained by appellants for about three weeks and cashed. The evidence unquestionably shows that there was a bona fide dispute between the parties as to whether such goods conformed in material and color to those ordered. It is conceded that if the check in question was accepted under these conditions the court's conclusion is correct.

The main controversy was whether the check was cashed unconditionally. After the matter had been in appellants' hands for nearly three weeks they turned the check over to their attorney, who had a telephone conversation with one of the

defendants. Said attorney claimed that the defendant said: "Your people use the check and we will litigate in regard to the balance." The defendant with whom the conversation was had testified: "I said we could use the money if he wanted to send the check back but he said he couldn't do that as he had no authority for it. He said he was going to write Jos. Cohen & Sons to accept that merchandise back and use our check. I told him to do as he pleased." The court evidently accepted appellees' version of this conversation and we cannot say it was in error in so doing. If appellants did not intend to accept the check as payment in full in view of the return of part of the goods and the apparently bona fide dispute as to their quality and color, then they should not have retained the check and cashed it under that state of facts. The law on this subject is too well settled to need citation. The decisive question of fact in controversy is as above stated. That being decided against appellants the court on the rest of the evidence reached the correct conclusion. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

Bellamy, E. L., and Everett, A., London.

140 - 27092

McNEAL & PRILLMAN,
Plaintiffs in Error,

vs.

WILLIAM JACKSON, Receiver for
The Chicago & Eastern Illinois
Railroad Company,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error seeks the reversal of a judgment of the Municipal Court of Chicago in favor of the defendant in an action brought to recover the value of 9,962 pounds of oats which are alleged to have been lost in transit between Henning, Illinois, and Cairo, Illinois. The case was tried by the court without a jury.

The only facts before the court were those included in the stipulation of the parties. No oral evidence was heard upon the trial. The facts are therefore undisputed and the controversy relates solely to the law applicable to the case. As shown by the stipulation, the plaintiffs, during March and April, 1920, shipped from Henning, Illinois, to Cairo, Illinois, over the railroad operated by defendant, three carloads of oats of the aggregate weight of 179,840 pounds. The grain was weighed and the cars loaded by plaintiffs, after which the car doors were boarded up to the roof. The defendant had nothing to do with the loading of the cars. Thereafter the cars were inspected and sealed by defendant's agent, who then delivered bills of lading to plaintiffs showing the weight of the respective shipments. These bills were filled out by plaintiffs, who inserted all necessary data, including weights, so that only the signature of the agent was required. Upon the arrival of the cars at Cairo and before delivery of their contents to consignee, the cars

were inspected by the Cairo Board of Trade and the original seals were found intact and unbroken. There was no evidence of any apparent leakage from the cars or that the cars had been tampered with in any way. The cars were unloaded and their contents weighed by the consignee at Cairo, who found a shortage of 9962 pounds of oats, the value of which is stipulated to be $252.15. The trial court held "as a matter of law, that under the evidence as stipulated in this case, the finding and judgment should be for the defendant."

The only question presented to this court for determination is, whether or not the stipulated facts justified the conclusions reached by the trial court. The stipulation contains no admission by the defendant that there was an actual shortage. It shows that at the beginning and end of the brief journey, the cars were in perfect condition. The seals were intact. There was no evidence of leakage in or repairs to the cars. The stipulation further shows that the weight of the grain, which by the bills of lading was "subject to correction," at the time of the loading was determined by plaintiffs to be 179,840 pounds and that the "outturned weight" of the contents of the cars as determined by the consignee showed a shortage of 9962 pounds. The stipulation does not show the actual weight of the grain either at the beginning or end of the journey. The perfect condition of the cars at the inception and close of the journey and the stipulated fact that the cars could not be opened without breaking the seals precludes the theory that there was any leakage or theft of the contents. These facts warrant the inference that the alleged shortage was due to mistakes in determining and recording the weight of the grain or to differences between the scales of plaintiffs and those of the consignee. The trial court was justified in reaching the conclusion that "under the evidence as stipulated," the plaintiffs could not recover.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

152 - 27105

IDA OLSON,
Defendant in Error,

vs.

NORTH AMERICAN UNION,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is defendant in error here, brought suit October 24, 1919, in the Municipal Court of Chicago to recover the balance alleged to be due her upon a benefit certificate issued by the North American Union, a fraternal beneficiary society incorporated under the laws of Illinois, upon the life of her husband, John Olson. The defenses urged are that plaintiff voluntarily settled her claim against the defendant, surrendered the certificate and gave a full release, which precludes her from maintaining the action, and further, that the insured violated the by-laws of the defendant by the excessive use of intoxicating liquors, thereby impairing his health and causing his death. There was a jury trial, resulting in a verdict and judgment in favor of plaintiff for $539.40, the balance due on the certificate, the defendant having previously paid $460.60 in connection with the alleged settlement.

The benefit certificate was issued December 1, 1898. It is undisputed that all assessments and dues were paid as required by defendant's by-laws. The amount of the certificate was $1,000. The insured died at the Chicago State Hospital November 10, 1918, from cerebral arterio sclerosis. The predisposing cause of his death was "bronche" pneumonia. The certificate, among other things, provided that the member must comply with the laws, rules and regulations governing the society, all of which were made a part

of the contract; that the contract should be incontestable after two years from its date, except for non-payment of dues, engaging in prohibited occupations and becoming habitually addicted to the excessive use of intoxicating liquors, contrary to the by-laws of the association. The by-laws provided, in substance, that any member of the order who became a drunkard or used intoxicating liquors to the impairment or destruction of his health thereby invalidated and annulled his membership in the order and that in such case neither he nor his beneficiary would be entitled to any of the benefits or payments provided by the certificate, and further, that if on the death of a member it should appear that his death resulted from or was caused by or from the use of intoxicating liquors, all rights and claims under the certificate should be forfeited and the beneficiary should be paid in lieu thereof a sum equal to the total amount actually paid by the member to the mortuary and reserve funds of the order. The application signed by the insured contained a statement on behalf of the applicant that he was not then addicted to the excessive use of intoxicating liquors, and if he should become so addicted, by so doing he should forfeit and terminate all rights under the certificate, and an agreement to comply with all of the laws, rules and usages of the society. In reply to questions put to him by defendant's medical examiner, the applicant stated that he used whiskey, beer and other kinds of wine and liquors; that he consumed daily an average of one glass of beer and two glasses of whiskey, the size of the glasses not being stated; that he was accustomed to take a drink of whiskey or brandy before breakfast daily; that it had been customary with him to take a drink of whiskey before breakfast for the past twenty years and that he generally took another before supper in the evening, but he never took more than two glasses daily. These answers were sufficient to advise the insurer that the applicant was a user of intoxicating liquors to such

an extent as to indicate that he had the habit. Under present standards this use would be regarded as excessive. With this information before it and with the knowledge that the habitual use of alcoholic liquors for many years was likely to increase with age rather than to lessen, thereby causing a possible deterioration in the physical condition of the insured, the company saw fit to accept the risk and received the payments of the insured for a period of twenty years. Under such circumstances the insurer cannot insist upon compliance with the requirements of the society as to abstinence from the use of alcoholic liquors. These conditions of the contract were for the benefit of the insurer and the insurer could waive them. It is a fair inference that the assessments and dues were paid for twenty years upon the understanding that the drinking habits of the insured would have no effect upon the validity of the certificate. Germania Life Ins. Co. v. Koehler, 148 Ill. 293; A. O. U. W. v. Davidson, 191 S. W. 961; Mutual Life Ins. Co. v. Stibbs, 46 Md. 302; Miller v. Mutual Benefit L. I. Co., 31 Ia. 216. The evidence was far from conclusive that the actual cause of the death of the insured was alcoholism. It was a question for the jury to decide and they were advised by sundry instructions, given at the request of defendant, to the effect that there could be no recovery if the jury believed from the evidence that the death of the insured was due to the excessive use of intoxicating liquors. The verdict of the jury in this respect was not contrary to the manifest weight of the evidence.

It is also urged by plaintiff in error that the beneficiary voluntarily settled her claim with the North American Union and that having accepted the sum of $460.00 in settlement and surrendered her certificate, and having given the North American Union a release of her claim, she cannot maintain an action on the certificate. It is urged that there was an honest dispute between her and the society as to the validity of her claim and that the claim was disputed in

good faith by the defendant and the parties made a compromise and settlement which should be sustained. It is settled law that where there has been a compromise in good faith of unliquidated or disputed demands, and where there is an honest difference between the parties as to the amount due, such an accord with satisfaction is binding upon the parties. Smith v. Mutual R. F. L. A., 140 Ill. App. 409; Hayes v. Massachusetts Mutual Life Ins. Co., 125 Ill. 626. The circumstances connected with the alleged settlement herein do not bring the case within this rule. The claim of the beneficiary was liquidated. It does not appear from the evidence that she accepted the sum of $460.50 in settlement of an honest dispute between her and the society. The evidence shows that after her husband's death she called upon the officers of the society and requested payment of the certificate, but that she encountered numerous delays before receiving any answer whatever and was informed by these officers, in substance, that she had no valid claim against the society. She did not act under the advice of counsel. Under such circumstances, it was natural for her to take what she could get and to sign any paper that she was asked to sign. The case comes within the rule established in other cases of a similar character, which hold that an acceptance by the creditor of a sum less than the amount due in full satisfaction of the debt is a discharge only of so much of the debt as is equal to the sum received. Farmers' and Mechanics' Life Assn. v. Gaine, 224 Ill. 599. The settlement and release were illegal and unauthorized and the general principle applies that the acceptance of a sum less than that actually due cannot be a satisfaction and will not operate to extinguish the whole debt, as there was no consideration for the relinquishment of the excess due beyond the sum paid. There was nothing to show the possibility of any benefit to the party who relinquished a legal right. Hayes v. Massachusetts Life Ins. Co., supra.

The certificate also contained a clause making it incontestable after two years from the date thereof, except for

non-payment of dues and the insured becoming habitually addicted to the excessive use of intoxicating liquors, contrary to the laws, rules and regulations of the association. The substance of the by-laws upon the use of intoxicating liquors has already been stated and the verdict of the jury under the instructions of the court, which were favorable to the defendant, established the fact that the death of the insured was not due to the excessive use of alcoholic liquors.

We find no reversible error in the instructions given or refused by the court or in the rulings of the trial court upon questions of evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

179 - 27134

GEORGE F. LOVDALL,
Appellee,

vs.

MATHIAS M. ZAKOWSKI,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

225 I.A. 662[5]

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court of Cook County against defendant, who is appellant here, for $417.67 and costs. Plaintiff's claim is for services rendered by him as an architect in preparing plans and specifications for a bungalow which defendant proposed to erect in Evanston, Illinois.

The declaration alleges and the proofs show that defendant employed plaintiff to make the plans and specifications in question and that plaintiff fulfilled his undertaking by preparing the preliminary studies, general drawings, plans and specifications for the proposed structure. He also took estimates for its construction, the lowest bid received from a responsible contractor being $16,707. It is undisputed that the architect was to be paid for his services, including superintendence of the construction work, an amount equal to five per cent upon the cost of the building as determined by the lowest bid received from a responsible contract. Defendant did not proceed with the erection of the building on account of the cost, which was more than he had anticipated. By reason of his failure to proceed, plaintiff claims that in accordance with the established custom among architects, there became due and owing to him an amount equal to two and one-half per cent of the lowest bid from a responsible contractor. The judgment was in conformity with plaintiff's contention, based upon an estimated cost of the building of $16,707. The plans and

specifications were delivered to defendant and retained by him. The defense is, that under the arrangement with the architect for his services, the latter was limited to the preparation of plans and specifications for a bungalow which was not to exceed in cost the sum of $12,000, and was not authorized to design a building of the character described, regardless of its cost, and that plaintiff agreed not to make any charge for his work if he was unable to build the proposed house for a sum not exceeding $12,000. This was the only essential fact in controversy between the parties.

It will not be necessary for us to review the evidence in detail, for the reason that the only ground urged by appellant for a reversal is the alleged errors of the court in giving certain instructions which were requested by plaintiff. Two instructions were offered by plaintiff, and at his request, given to the jury. The first of these was as follows:

> "The Court instructs the jury, that if you believe from the evidence that the defendant employed the plaintiff as an architect in and about the preparing of plans, the writing of specifications for the construction of the proposed building, the mere fact that the building was not erected does not bar the plaintiff's right to recover."

This instruction had a tendency to mislead the jury. It dealt with only one feature of the evidence. It contained no reference to the essential question of performance of the contract by plaintiff and inferentially advised the jury that the only questions involved in the case were the employment of plaintiff by defendant and the failure of defendant to proceed with the construction of the building. It did not refer to the only issue in the case and when considered in connection with the other instruction of which complaint is made, the jury were likely to reach the conclusion that plaintiff was entitled to recover regardless of the evidence introduced on behalf of defendant.

The other instruction given at the request of plaintiff is as follows:

specifications were delivered to defendant and accepted by him. The defense is, that under the arrangement with the architect for his services, the latter was limited to the preparation of plans and specifications for a building which was not to exceed in cost the sum of $15,000, and was not obligated to furnish a building of the character described, regardless of its cost, and that plaintiff agreed not to make any charge for his work if he was unable to build the proposed house for a sum not exceeding $15,000. This was the only essential fact in controversy between the parties.

It will not be necessary for us to review the evidence in detail, for the reason that the only ground urged by appellant for a reversal is the alleged error of the court in giving certain instructions which were requested by plaintiff. Two instructions were offered by plaintiff, and at his request, given to the jury. The first of these was as follows:

> "The Court instructs the jury, that if you believe from the evidence that the defendant employed the plaintiff as an architect to and after the preparation of plans, the writing of specifications for the construction of the proposed building, the mere fact that the building was not erected does not bar the plaintiff's right to recover."

This instruction had a tendency to mislead the jury. It deals with only one feature of the evidence. It contains no reference to the essential question of performance of the contract by plaintiff and inferentially advised the jury that the only questions involved in the case were the employment of plaintiff by defendant and the failure of defendant to proceed with the construction of the building. It did not refer to the main issue in the case and when considered in connection with the other instruction of which complaint is made, the jury were likely to reach the conclusion that plaintiff was entitled to recover regardless of the evidence introduced on behalf of defendant.

The other instruction given at the request of plaintiff is as follows:

"The Court instructs the jury that if you believe from the evidence that the defendant employed the plaintiff as architect to draw plans, make preliminary studies and specifications, and if you further believe from the evidence that the plaintiff was to receive a fee of five per cent (5%) based upon the total amount of the lowest bids received from responsible contractors, and if you further believe from the evidence that the defendant abandoned the work after the completion of the plans, specifications, etc., and that the defendant agreed to pay the plaintiff two and one-half per cent (2½%) of the lowest bids received from responsible contractors for the making of preliminary studies, general working drawings and the writing of specifications, the Court instructs you to find the issues for the plaintiff and against the defendant."

This instruction was prejudicial and misleading. It was peremptory and directed the jury to find for plaintiff without reference to the only issue of fact involved in the case.

The plaintiff in this case was entitled to recover if the jury believed that he was employed by defendant to prepare plans and specifications for the building and superintending its construction without stipulation as to the cost of the proposed building, and that defendant agreed to pay plaintiff a commission of two and one-half per cent upon the cost of the building for preparing plans and an additional two and one-half per cent for superintendence, and that plaintiff prepared the plans and specifications in accordance with this agreement, but defendant failed and refused to proceed with the construction through no fault of plaintiff and without justification. The second instruction above quoted was also erroneous, because it directed a verdict without reference to the one disputed issue of fact in the case and to facts and circumstances disclosed by the evidence and upon which defendant relied. The giving of an instruction for the plaintiff, ignoring matters of defense of which there is evidence fairly tending to prove, is reversible error, and a misleading instruction of that character is not corrected by the giving of correct instructions on behalf of the opposing party. In the case at bar there was a conflict in evidence on a disputed issue of fact rendering it essential to a clear understanding and proper determination by the jury, that the instructions should be accurate

statements of the law, applicable to the evidence before them and free from defects which would tend to mislead. Gerrell v. Payson 170 Ill. 217; Montgomery Coal Co. v. Berringer, 218 id. 327; Mulcahy v. Milford, 213 Ill. App. 423. A defective instruction which directs a verdict is not cured by other instructions correctly stating the law. The instruction should have embraced all the facts and conditions essential to the verdict.

In discussing these instructions, it is argued by appellee that the court did not err in ignoring in its instructions matters of defense supported by evidence tending to prove them. An inspection of the authorities cited by appellee shows that the rule for which appellee contends was subject to the limitation that the instructions, taken as a series, fairly and impartially state the law. Appellee overlooks entirely the well settled rule that a defective instruction directing a verdict is not cured by other instructions which correctly state the law. Partridge v. Butler, 168 Ill. 504; Illinois Iron and Metal Co. v. Weber, 196 id. 526: Rattner v. Chicago City Ry. Co., 233 id. 169.

For the errors above indicated, the judgment of the County Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

191 - 27147

A. B. C. CHEMICAL COMPANY,
a corporation,
Appellee,

vs.

C. F. WIEHE et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 663

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The original statement of claim filed herein alleged that defendant, which was the Franco-American Chemical Corporation, was indebted to plaintiff in the sum of $2,487.97 for goods sold and delivered, consisting of various chemicals and apparatus employed in manufacturing chemical products, the specific items of which it is unnecessary to enumerate. Subsequently, John H. Ledr and C. F. Wiehe were made defendants and an amended statement of claim was filed, which alleged that the two additional defendants attempted to organize the defendant corporation; that on November 5, 1918, a license was issued by the Secretary of State to certain persons as commissioners to open books for subscription to the capital stock of the Franco-American Chemical Corporation, and that the commissioners did not proceed further with the organization of the corporation; that the defendants Ledr and Wiehe were co-partners in the manufacture and sale of chemicals, doing business under the name of the Franco-American Chemical Corporation, which was merely a partnership; that the defendant Ledr represented himself to be a duly elected officer of said defendant corporation, and acting under that belief, plaintiff, at the request of Ledr, sold and delivered the goods and merchandise in question to the alleged Franco-American Chemical Corporation, when in fact Ledr purchased said goods for and on behalf of the partnership, doing business under that name; that on or about November 12, 1918,

plaintiff and defendant Ledr, "co-partners as above alleged," entered into an agreement whereby Ledr, under the name of the Franco-American Chemical Corporation, "in fact a partnership between C. F. Wiehe and John C. Ledr," agreed upon the purchase price of said articles, amounting in the aggregate to $2,487.97, approximately all of which had been used by the two defendants Ledr and Wiehe, and for which they are indebted to plaintiff to the amount above stated, and are jointly and severally liable.

A joint and several affidavit of merits was filed on behalf of the Franco-American Chemical Corporation and the defendants Wiehe and Ledr, which denied the corporate existence of the plaintiff and alleged that said plaintiff was incorporated under the laws of Illinois in 1917, and that its charter was cancelled by the Secretary of State prior to the commencement of this action, thereby rendering it incompetent to maintain the suit. The defendants and each of them denied any dealings whatever with plaintiff and denied specifically the several allegations in the statement of claim to the effect that defendants were co-partners doing business under the name of the Franco-American Chemical Company, that the defendant Ledr represented himself as an officeror manager of the Franco-American Chemical Corporation, the alleged sale of the goods by plaintiff to defendants or either of them, and that the said merchandise was purchased by said Ledr on behalf of the partnership for himself and the defendant Wiehe. The defendants further denied any agreement between plaintiff and the defendant Ledr as to the prices of said articles, and that the said goods and merchandise were used by defendants or either of them, and denied any and all liability, joint or several, to plaintiff.

For further answer to the matters alleged in the amended statement of claim, defendants admitted that they had agreed to form a corporation known as the Franco-American Chemical Corporation;

that sometime prior to November 12, 1918, one Dr. Jay F. Pitts, who is said to be president of the plaintiff company, entered into an agreement with defendants Wiehe and Ledr to form such a corporation for the purpose of manufacturing and selling chemicals under the name of Franco-American Chemical Corporation with a capital of $25,000, of which each was to contribute one-third; that defendants Wiehe and Ledr fulfilled their agreement in that respect but that Pitts did not carry out his agreement, and for that reason the formation of the corporation was never completed; that when Pitts was called upon for his share of the capital he failed and refused to contribute the same, but stated that he would contribute some material; that sometime thereafter certain material arrived at the plant of the defendants on Altgeldt street in Chicago, some of which appears to be described in the amended statement of claim; that none of said material was delivered with the knowledge or upon the order of either of the defendants, but came as a contribution to the enterprise from said Pitts; that defendants did not at any time know there was any such concern in existence as the plaintiff corporation, and charged that said A. B. C. Chemical Company was simply a name under which Dr. Jay F. Pitts did business; that the goods and merchandise described in the amended statement of claim were supposed to be the property of said Pitts and furnished by him as a part of his capital in said enterprise, and that if said Pitts purchased the same from any corporation he did so as his own act without any authority, knowledge or consent from the defendants or either of them. The affidavit of defense further stated that after defendants were informed that said property was at the plant they refused to accept the same and served a notice for its removal on said Pitts on or about February 10, 1920, but that said Pitts and said plaintiff failed, neglected and refused to comply with said notice, but left the articles at the plant of these defendants; that if the goods and merchandise belonged to plaintiff, its right of

action, if any, is against said Fitts and not against these defendants, and if there is any corporation entitled to maintain this suit known as the A. B. C. Chemical Company, then said Fitts is the owner and proprietor of the same and is simply using the name as a means of suing these defendants, and finally, that if defendants Wiehe and Ledr are liable as partners for the merchandise in question, then said Fitts is a partner also and incompetent to sue these defendants. There was a jury trial which resulted in a verdict and judgment in favor of plaintiff and against defendants Ledr and Wiehe for $2,487.97, from which this appeal has been prosecuted.

We do not consider it necessary to review in detail the evidence, which in general sustains the allegations of the affidavit of merits filed by defendants. It does not disclose any agreement whatever on behalf of defendants Wiehe and Ledr to purchase the merchandise described in the amended statement of claim. The only witness who testified on behalf of plaintiff was Dr. Jay F. Fitts, who signed the affidavit attached to plaintiff's statement of claim, wherein he alleged that he is the president of the plaintiff corporation. His testimony as to the contractual relations between himself and defendants and the alleged sale of the goods and merchandise to defendants is not of a convincing character. A preponderance of the evidence shows that said Fitts, in company with defendants Ledr and Wiehe, agreed to form a corporation, as alleged in the affidavit of defense; that the two defendants performed their part of the agreement but that Fitts wholly failed to contribute his share of the agreed capital, except in so far as the goods and merchandise mentioned in the amended statement of claim may be regarded as a part payment on his account. The incorporation of the France-American Chemical Corporation was not completed, apparently on account of the failure of Fitts to contribute his share of the capital and the transaction seems to have been abandoned. The oral and documentary evidence seems to show that Fitts and the

defendants Ledr and Vishe may be regarded as partners in the business conducted under the name of Franco-American Chemical Corporation. If so, either of them may be entitled to an accounting in equity. The evidence wholly fails to prove the existence of any contract on the part of defendants or either of them to purchase from plaintiff the goods and merchandise mentioned in the statement of claim.

Appellants have called our attention to numerous alleged errors on the part of the trial court in rulings upon evidence and in giving and refusing to give instructions. Many of these contentions seems meritorious, but we do not deem it necessary to discuss them in detail, as we are of the opinion that plaintiff has shown no right of action at law against defendants.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

191 - 27147

FINDING OF FACT.

The court finds as an ultimate fact in the case that there was no agreement, express or implied, for the purchase by defendants or either of them from plaintiff of the goods and merchandise mentioned in plaintiff's statement of claim.

202 - 27159

MORRIS DRY and MEYER DRY, doing business as Dry and Company,
Appellees,

vs.

FORD ROOFING PRODUCTS COMPANY, a corporation, also known as Ford Roofing Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellees brought suit in the Municipal Court of Chicago to recover from appellant the purchase price of several carloads of rags. Defendant, who is appellant here, admitted the purchase of the rags and its obligation to pay the agreed price therefor, less certain deductions which were claimed and allowed. The correct amount of the purchase price was admitted upon the trial to be $1,718.62. After refusing to receive certain evidence offered by defendant, the court directed the jury to find the issues for plaintiffs and assessed plaintiffs' damages at said sum and entered judgment upon the verdict. A reversal is sought upon the ground that the trial court erred in refusing to hear evidence as to matters set forth in defendant's affidavit of merits, which, if established by proper proof, would constitute payment by defendant of plaintiffs' claim.

The purchase of the rags took place in February, 1919, as shown by defendant's written order for the same. As there is no dispute about the value of the rags it will be unnecessary to review the pleadings upon that branch of the case. By its amended affidavit of merits, defendant alleged that in February, 1919, it sold and delivered to plaintiffs, who purchased and received the same from defendant, three carloads of mixed string at the price of $30 per ton, defendant at that time being indebted to plaintiffs

for the rags purchased; that plaintiffs directed defendant to charge plaintiffs' account with the price of the string, plus transportation charges thereon; that plaintiffs requested defendant to ship said three cars of string to plaintiffs at Chicago as soon as possible; that thereupon defendant charged plaintiffs' account with the purchase price of the three cars of mixed string at the rate of $30 per ton including transportation; that by so doing the entire amount due from defendant to plaintiffs for the rags was fully paid; that defendant shipped the three cars of string to plaintiffs at Chicago early in March, 1919, and upon their arrival plaintiffs advised defendant that they could not use the said cars of string and directed defendant to sell the same for and on behalf of plaintiffs for the highest price obtainable, and further directed defendant to credit the amount received for said three cars of string on the amount then due from plaintiffs to defendant. The affidavit further charged that defendant sold said string in conformity with these directions to the Central Trading Company for the highest price obtainable and realized therefrom $526.14, with which amount it credited plaintiffs' account, as directed by plaintiffs, and that defendant then remitted to plaintiffs the amount then remaining due from defendant to plaintiffs as shown by the account. The affidavit further alleged that a statement of this account, showing the transactions above set forth, was forwarded to plaintiffs, and defendant alleged that said account became stated between the parties.

Upon the trial of the case defendant offered to prove the foregoing matters alleged in its affidavit of defense, but the court declined to receive the proof upon the ground that the two transactions, one in rags and the other in string, did not arise from the same transaction; that each was complete in itself and that the claim of defendant based upon the sale of string

for the page mentioned, that plaintiff should be entitled to assume plaintiff's account with the image of the letters, upon presentation showing therein; that plaintiff's customers referred to said letter made of orders to plaintiff's clerks to see as provided; that subsequent correspondence between plaintiff's account with the previous price of the letter was at short rights in the mind of the defendant representatives, that by so doing the orders amount was from defendant to plaintiff for the price and fully said, that defendant failed the above item of orders to plaintiff's at Toronto month in letter, and upon that defendant plaintiff's orders letters that they were not as the will type of prices and letters contained to will the same for and as amount of plaintiff's for the slight price contract, the letters letters referred to which the market for the orders amount from the from plaintiff's to defendant. The plaintiff further charged that defendant made full trial in contradicting with those directions to the United Trading Company for the slight price obtainable and received therefrom $[illegible], with which amount it credited plaintiff's account, as directed by plaintiff, and that defendant then credited to plaintiff's the amount been receiving due from defendant to plaintiff as shown by the account. The plaintiff further alleged that a statement of this account, showing the transactions above set forth, was furnished to plaintiff, and defendant alleged that with correct balance which defendant owed plaintiff.

Upon the trial of the case defendant offered in proof the following matters claimed in its statement of defence, but the court rejected to include the proof upon the ground that the transactions, are in suit and the whole is without, in any origin from the same transactions that such was conducted in itself and that the claim of plaintiff based upon the sale of [illegible]

was not liquidated.

The defense which was presented in this case was one of payment and not of set-off or recoupment. There was no claim of set-off filed. The distinction between payment and set-off is clearly set forth by the Supreme Court in the case of Litch v. Clinch, 136 Ill. 410, and the difference between the two defenses lies in the fact "that it is optional with the defendant to plead his set-off as a defense or make it the subject of an independent suit, while ordinarily at least the defense of payment must be presented and litigated in the suit brought to recover the indebtedness alleged to have been paid or it will be barred and lost." Both of the parties to this suit have directed our attention to numerous authorities dealing with the subject of set-off, which we do not consider applicable to the present controversy. Payment of a claim can be made by the delivery of goods or other specific articles if the contract so provides or the creditor consents thereto and acquiesces therein. 30 Cyc. 1187. The affidavit of merits clearly alleged that plaintiffs had consented to accept payment in whole or in part for their shipment of rags by the shipment of string made by defendant. The defense relied upon was valid if sustained by the proof.

It is urged by appellees that the alleged defense is invalid because the claim of defendant, based upon its shipments of string, was unliquidated. Unliquidated damages are those that rest in opinion only, and must be ascertained by a jury, whose verdict is regulated by the circumstances of each particular case. They cannot be ascertained by computation or calculation, and arise in cases where the amount thereof must be determined by the judgment or opinion of a jury. Ideal Coated Paper Co. v. Cupples Envelope Co., 169 Ill. App. 484. The items for which defendant claims credit were for goods sold and delivered at a specific price. It has been repeatedly held that a claim of this kind cannot

was not [illegible].

The defense which was presented in this case was one of payment and not of set-off or recoupment. There [illegible] of set-off filed. The distinction between payment and set-off is clearly [illegible] by the [illegible] in the case of [illegible] v. Clark, [illegible] Ill. [illegible], and the [illegible] lies in the fact [illegible] himself [illegible] while [illegible] [illegible] were claimed to have been paid [illegible]. None of the [illegible] to this suit have [illegible] of set-off, which is not [illegible]. [illegible] a claim can be made by the [illegible] or [illegible] articles [illegible] and [illegible]. [illegible] claim [illegible] their [illegible] made by [illegible]. The [illegible] by the [illegible].

It is urged by [illegible] that the [illegible] of [illegible] between the [illegible] of [illegible], [illegible] of [illegible], [illegible] this rest is [illegible] only, [illegible] There [illegible] and [illegible] the [illegible] or [illegible]. [illegible] [illegible]., [illegible] Ill. [illegible]. [illegible] which [illegible] for goods sold [illegible] price. It [illegible]

be regarded as unliquidated. East v. Crowe, 70 Ill. 91; Tartt v. Ramey, 158 Ill. App. 468; Keenan Mercantile Co. v. Walter, 104 id. 279; Luther v. Mathis, 211 id. 596. The court should have allowed defendant to present its evidence offered in support of the defense alleged in its affidavit of merits. This defense involved questions of fact which it was proper to submit for the determination of the jury.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

226 - 27185

MILTON T. KIMBALL,
Appellee,

vs.

LONTIN BROS. & COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim alleged that he was employed by defendant, who is appellant here, about October 26, 1920, as a clerk at a monthly salary of $125; that the employment continued until March 21, 1921, when plaintiff was discharged without notice; and that he was entitled to thirty days' notice prior to his discharge, by reason whereof defendant became indebted to him for $125. There was a finding and judgment in favor of plaintiff for $117.79 and costs. No brief is filed on behalf of appellee.

The evidence shows that plaintiff was employed as above stated and was discharged March 20, 1921, on account of his refusal to work on the evening of that date. He had been paid previously for the amount due him up to March 15, 1921, at the agreed rate and was tendered payment up to the date of his discharge. The tender was refused but was again made in court upon the trial and again refused, plaintiff claiming that he was entitled to pay for a full month.

There is no evidence whatever showing or tending to show that the agreement under which plaintiff was employed by defendant contained any condition or provision which entitled him to demand thirty days notice of his discharge or to receive payment for any period after the date of his discharge.

The finding and judgment of the Municipal Court was

contrary to the weight of the evidence, and for that reason must be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

228 - 37185

FINDING OF FACT.

The court finds as an ultimate fact in this case that there was no agreement between the parties requiring the employer to give the employee thirty days notice of the discharge of the latter.

237 - 27194

EDWARD A. DALY,
Appellee,

vs.

EDWARD A. MORRIS and
JENNIE WOLF MORRIS,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 663

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered by the Municipal Court of Chicago in favor of plaintiff in an action of forcible detainer brought to recover possession of apartment "Number 3 on the third floor of the building known as number 5435 Michigan avenue," in Chicago.

Defendants were in possession of the premises under a lease from the owners, dated April 26, 1920, for a term commencing May 1, 1920, and ending April 30, 1921, and from year to year thereafter "unless and until this lease shall be terminated at the date last above mentioned or a like date in any subsequent year thereafter by the giving by either party to the other not less than sixty days notice in writing of such termination, which said notice shall be delivered in person or by registered mail." The lessors gave such notice to the lessees, notifying them that the lease would terminate April 30, 1921, and stating therein that the notice was given pursuant to the provision for a sixty day notice in said lease. This notice was dated February 14, 1921. It was sent by registered mail to the lessees and received by them February 15, 1921. Defendants remained in possession of the premises after April 30, 1921. The suit was brought May 3, 1921, by plaintiff, who is the lessee of the premises in question under a lease from the owners for a term commencing May 1, 1921.

Appellants contend that the notice was insufficient to terminate the lease by reason of a variance between the description of the premises set forth in the lease to defendants and that contained in the notice of February 14, 1921. In the lease the premises in question are described as "Apartment No. 3 on the third floor of number 5435 Michigan avenue," while in the notice the premises are described as "Third apartment, 5435 Michigan avenue." It is undisputed that the notice was given by lessors and received by defendants more than sixty days prior to April 30, 1921, and that the notice was sufficient to advise defendants that it related to their lease of the premises in question. It was plainly intended to terminate the lease in accordance with its provisions. The notice described the premises with reasonable certainty, and if construed according to the intention of the contract, as appellant contends must be done, shows a clear intention to terminate defendant's tenancy.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, J., concurs;
Mr. Presiding Justice Gridley took no part in the decision of this case.

348 - 17264

FLORENCE C. DOELLE,
Appellee,

vs.

EDWARD BROW,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORELL DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal Court of Chicago by appellee against appellant on May 3, 1921. The case was assigned to a certain court room in the City Hall and was reached for trial May 19, 1921. On the preceding day the attorney for defendant having learned the identity of the judge presiding in the room to which the case had been assigned, notified his opponent that he would ask for a change of venue. When the case was called for trial defendant's attorney requested a change of venue and presented defendant's verified petition therefor. The record shows that the motion was overruled and the petition denied, solely because the defendant was not then present in court and could not be produced for examination within fifteen minutes.

Evidence was then heard on behalf of plaintiff only. The petition for a change of venue was offered in evidence and refused. Counsel for defendant objected to the proceedings and declined to introduce any evidence. The trial judge then instructed the jury to find the issues for plaintiff and entered judgment for possession in favor of plaintiff.

The sole question involved in this appeal is whether or not the trial judge erred in denying defendant's motion for a change of venue. It was urged by appellee that the petition was defective and did not comply with the statute. The alleged defects in the petition are not apparent. It was verified as

Appellants contend that the motion was insufficient to terminate the issue by reason of a variance between the description of the premises, and that in the issue is determinate and that was raised in the motion of February 24, 1978. In the issue the premises is described as described in "Exhibit 1A, a so the exact item of another real estate account," while in the motion the premises are described as "Third Quarterly, Kim Stanford account." It is admitted that the motion was given by Lessors and received by defendants more than ninety days prior to April 30, 1983, and thus the motion was sufficient to notify defendants that it related to the issue of the premises in question. It was plainly intended to terminate the lease in accordance with the provisions. The motion described the premises with particularity, and if additional clarity is the individual of the contract, is significant contents must be then, where a clear indication is evidence defendant's tenancy.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Burnett, J., concurs.

Mr. Presiding Justice Prather took no part in the decision of this case.

246 - 27204

FLORENCE G. COWLES,
Appellee,

vs.

EDWARD BROW,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 664

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal Court of Chicago by appellee against appellant on May 3, 1921. The case was assigned to a certain court room in the City Hall and was reached for trial May 19, 1921. On the preceding day the attorney for defendant having learned the identity of the judge presiding in the room to which the case had been assigned, notified his opponent that he would ask for a change of venue. When the case was called for trial defendant's attorney requested a change of venue and presented defendant's verified petition therefor. The record shows that the motion was overruled and the petition denied, solely because the defendant was not then present in court and could not be produced for examination within fifteen minutes.

Evidence was then heard on behalf of plaintiff only. The petition for a change of venue was offered in evidence and refused. Counsel for defendant objected to the proceedings and declined to introduce any evidence. The trial judge then instructed the jury to find the issues for plaintiff and entered judgment for possession in favor of plaintiff.

The sole question involved in this appeal is whether or not the trial judge erred in denying defendant's motion for a change of venue. It was urged by appellee that the petition was defective and did not comply with the statute. The alleged defects in the petition are not apparent. It was verified as

required by law and stated the reason for the application, which was, in substance, the belief of the defendant that he would not receive a fair trial on account of the prejudice of the trial judge. No objection was made at the trial to either the form or the substance of the petition, which was denied not on account of defects therein, but because defendant could not be produced for examination within fifteen minutes.

There is no merit in appellee's argument based upon alleged defects in the petition. The petitioner had a right to a change of venue if he believed that the judge was prejudiced against him. Sec. 1, chap. 146 R. S. It has been held repeatedly that upon a proper application a change of venue must be granted. The statute is imperative upon the subject. Stauber v. Stauber, 200 Ill. App. 137; Knickerbocker Ins. Co. v. Tolman, 80 Ill. 106; Glos v. Garrett, 219 id. 308. In Feigen v. Schaeffer, 256 Ill. 493, the judgment was reversed and the case remanded for failure of the trial court to grant a change of venue.

The judgment of the Municipal Court is reversed and the case remanded with directions to grant the application for a change of venue.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

required by law and denied the reason for the application, which was, in substance, the belief of the defendant that he would not receive a fair trial on account of the prejudice of the trial judge. No objection was made as the trial to either the form or the substance of the petition, which was denied and on appeal of defendants counsel, but because defendant could not be produced the application was filed elsewhere.

There is no merit in appellant's argument based upon alleged defects in the petition. The petitioner had a right to a change of venue if he believed that the judge was prejudiced against him. Tex. I. Comp. Lit. R. 1. It has been held repeatedly that upon a proper application a change of venue must be granted. The statute is mandatory upon the judge. Ingmar v. Ingmar, 300 S.W. 1.; Ex Parte Chatterton, Ex. v. Clemens, 90 S.W. 500; Ex v. Everett, 119 S.W. 1.; Ex Parte v. Schneider, 174 S.W. 1.; Ex Parte v. Ingmar, 300 S.W. 1.

The judgment of the trial court is affirmed and the case remanded with directions to grant the application for a change of venue.

Affirmed and remanded with directions.

Dissent, W.T.W., and Davis, J., concur.

255 - 27213

HYMAN CHERTOV,
Appellee,

vs.

RELIABLE STORE FIXTURE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action brought to recover the purchase price of eight show cases ordered by appellant from appellee. The case was tried by the court without a jury and judgment entered in favor of plaintiff for $759 and costs, from which this appeal has been taken.

Acting upon defendant's order, plaintiff manufactured for defendant the eight show cases in question. The parties agreed upon the purchase price. Five of the cases were delivered to defendant and the remaining three were tendered to it March 1, 1921, but were refused by defendant. Defendant admits the giving of the order for the cases at the price stated, but alleges by way of defense that the material used and the workmanship employed in manufacturing and finishing the cases were so faulty and defective as to render them useless to defendant and that they were not in accordance with the written order. A reversal is sought upon the ground that the finding and judgment of the Municipal Court are contrary to the preponderance of the evidence.

The testimony of the various witnesses called by the respective parties was conflicting. The evidence on the part of plaintiff tends to prove that after the show cases had been manufactured they were examined by the president of the defendant

corporation and pronounced satisfactory; that no objections to the articles were made by it and that defendant's only complaint related to the purchase price, which it was claimed was too high. This testimony was denied by the president of defendant corporation. He and several other witnesses testified that the show cases were not made of first class material and were defective in workmanship.

Under these circumstances it was clearly a question for the court to decide which witnesses were the more worthy of belief and to determine which side of the controversy was sustained by the greater weight of the evidence, as tested by well established rules. It is a familiar principle that the trial judge who sees the witnesses, hears their testimony and observes their demeanor while testifying, is better qualified to pass upon their credibility than a reviewing court, whose conclusions must be based upon the printed record. For this reason the rule is firmly established that, where there is an irreconcilable conflict in the testimony, the judgment of the trial court will not be reversed if the evidence in favor of the successful party, by fair and reasonable intendment, will sustain the judgment. Calvert v. Carpenter, 96 Ill. 63; Lane v. Lesser, 135 id. 367; Carney v. Sheedy, 295 id. 78. These and many other decisions to the same effect are controlling in the present case.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

misperceiving and misremembering satisfactorily that no objections to the evidence were made by it and that defendant's only complaint relates to the jurisdiction point, which it was claimed was too late. This testimony was denied by the president of defendant corporation. He and several other witnesses testified that the same votes were not made at first class meetings and were determined by ballot.

Under these circumstances it was clearly a question for the court to decide, which witnesses were the more worthy of belief and to determine which side of the controversy was sustained by the greater weight of the evidence, as tried by well established rules. It is a familiar principle that the trial judge who sees the witnesses, hears their testimony and observes their demeanor while testifying, is better qualified to pass upon their credibility than a reviewing court, whose consideration must be based upon the printed record. For this reason the rule is firmly established that, where there is no irreconcilable conflict in the testimony, the judgment of the trial court will not be reversed if the evidence in favor of the successful party, by fair and reasonable inferences, will sustain the judgment. Dalton v. Dalton, 94 Ill. 90; Lane v. Lane, 248 Ill. 487; Jackson v. Jackson, 293 Ill. 78. There was ample other evidence in the case after the conclusion in the primary suit.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Wilson, J., dissenting.

264 - 37222

ALICE STEIN,
Appellee,

vs.

SAMUEL GOLIMAN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

225 I.A. 661

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in the Superior Court of Cook County in favor of plaintiff and against defendant for the sum of $1500 as damages for slander. The jury rendered a verdict for $3,000, but the trial court directed a remittitur of $1500 and entered judgment for the remaining sum. A reversal of this judgment is sought upon the ground that the verdict and judgment were contrary to the weight of the evidence and that the damages were excessive even after the allowance of the remittitur.

It is urged by appellant that when the verdict is clearly against the weight of the evidence, it is the duty of the trial court to grant a new trial. It will not be necessary for us to review the evidence in the case, for the reason that there was no motion on the part of defendant for a new trial. The rule is well settled that where there is a trial by jury, a reviewing court cannot inquire into the sufficiency of the evidence to support a judgment unless there is a motion for a new trial and exception to the overruling of the same. I. C. R. R. Co. v. O'Keefe, 154 Ill. 511; Firemen's Ins. Co. v. Peck, 126 id. 493.

Although we are not permitted under the foregoing rule to pass upon the question raised as to the preponderance of the evidence, we have examined the record with a view to determining whether or not the damages awarded are excessive.

and are of the opinion that even if the slanderous words were spoken as claimed by plaintiff, her damages could not by any rule of computation be placed at so large a sum as $1500. The amount of the verdict found by the jury can be explained only upon the theory that the jury misconceived the nature and extent of plaintiff's damages. We are of the opinion that the sum of $750 will constitute a liberal compensation for any damages sustained by plaintiff.

The judgment of the Superior Court is affirmed, provided appellee files a remittitur of $750 within ten days; otherwise the judgment will be reversed and the case remanded.

AFFIRMED ON REMITTITUR.

Gridley, P. J., and Barnes, J., concur.

291 - 27249

SAMUEL L. MARK, Doing Business as MICHIGAN SCRAP IRON COMPANY,
Appellee,

vs.

JULIUS LOESER, Doing Business as JULIUS LOESER & COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

295 I.A. 664 4

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff, who is appellee here, against Julius Loeser, the defendant and appellant, in the Municipal court of Chicago to recover an amount alleged to be due for certain flasks and bottles sold by appellee to appellant for an agreed purchase price of $439.50. The affidavit of merits admitted the purchase of the merchandise, but denied that the bottles shipped were of the size, quality or kind ordered by him; alleged that there was a shortage in the shipment and that the bottles could not be used for the purposes intended and were therefore rejected by the purchaser. Defendant also filed a claim of set-off for the freight charges, demurrage and cartage upon the merchandise. The case came on for hearing before the Municipal court on April 12, 1921, and after it had been partially heard there was a postponement to May 9, 1921, on which date the case was again reached for trial. The defendant was not then present in person or by attorney, and judgment was entered in favor of plaintiff for the amount claimed.

A motion was made to vacate this judgment on June 8, 1921, supported by the affidavit of plaintiff's attorney. After consideration thereof and listening to arguments by counsel, the court denied the motion. The present appeal is from the order of the Municipal court denying the motion to vacate the judgment of May 9, 1921.

The affidavit filed in support of this motion states that the affiant believed and understood that the postponement of the trial on April 12, 1921, was to May 10, 1921, and that he remained under that impression until the afternoon of May 9, 1921, when he was informed by the attorney for plaintiff that the case had been heard on that day and judgment entered against defendant for $439.80; that he thereupon entered into negotiations with plaintiff's attorney for the settlement of the judgment, which were unsuccessful, and that by reason of these negotiations there was a delay in presenting the motion to vacate the judgment.

It does not appear from the affidavit that the defendant had a meritorious defense to the action, and no reasonable excuse is shown for failure to appear upon the date of the trial. Under such circumstances the discretion of the trial court in refusing to set aside the judgment will not be disturbed. The defaulted party must show both diligence and merit. Barrett v. Queen City Cycle Co., 179 Ill. 68; Mandel v. Kimball, 38 id. 542; Mendelman v. Haffenberg, 139 Ill. App. 443; Flynn v. Cook, 166 id. 13. There was no abuse of discretion on the part of the trial court in refusing to vacate the judgment.

The order of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

303 - 27261

HERBERT W. DUNCANSON et al., vs. GEORGE LILL et al., On appeal of George Lill et al., Appellants, vs. PEOPLE OF THE STATE OF ILLINOIS, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellants seek the reversal of a decree of the Superior Court of Cook County entered June 22, 1921, finding them guilty of contempt of court for their failure and refusal to answer certain interrogatories propounded and embodied in the amended bill of complaint herein and imposing a fine of $25 upon each of the respondents, and further directing, in the event of default in payment thereof, that the respondents be committed to the county jail for a period not exceeding ten days.

The amended bill of complaint, filed October 18, 1920, alleged that on March 29, 1918, complainants Herbert W. Duncanson and Harriet B. Duncanson were the beneficial owners of the equity in certain real estate therein described, the fee simple title of which, subject to certain encumbrances, was vested in the Chicago Title and Trust Company as trustee under a certain trust agreement between that company and said complainants; that on said date defendants were engaged in the wholesale and retail coal business and were creditors of the complainant Herbert W. Duncanson to a considerable amount for coal furnished to him, and that in order to secure the claim of said defendants and to obtain coal for the future operation and maintenance of his apartment buildings, said

Duncanson entered into an agreement, partly written and partly oral, with defendants, whereby he and the said Harriet H. Duncanson, on March 29, 1918, agreed to convey to defendants their interest in the lands as security for said obligations, and with the further agreement that said complainants have the right to redeem said lands or repurchase them from defendants upon payment to them of a sum not exceeding $55,000 at any time within a period of two years from the date thereof and to redeem said lands upon certain agreed terms.

The bill further alleged that in accordance with said agreement, the real estate was conveyed to defendants and has been operated by them continuously since that time. The bill prays for an accounting and for a reconveyance of the lands in accordance with said agreement. Answers were filed by defendants denying the material allegations of the bill, to which complainants filed their exceptions. These exceptions were withdrawn by leave of court and on January 20, 1921, complainants filed a further amendment to their bill containing the interrogatories already mentioned. Certain pleas were thereupon filed by defendants, which were afterwards withdrawn pursuant to leave of court and a joint and several answer filed to the amended bill of complaint embodying practically the same allegations and denials as were contained in the original answer, but also averring that the discovery sought by the interrogatories mentioned, in no manner tended to prove or disprove that complainants have any right, title or interest in and to said premises, and in an argumentative way alleging that to require defendants to answer said interrogatories would be to give complainants the relief sought by them before their right to such relief had been determined by the court and would be compelling defendants to make discovery of their private transactions, and praying that they be excused from answering said interrogatories until complainants had established their right to an accounting.

Exceptions were filed by defendants to this answer, which were heard by the court April 30, 1921, and after argument sustained, and an order entered directing defendants to file a complete and sufficient answer to the bill as amended, including a full and complete answer to said interrogatories within five days from that date. Defendants did not comply with this order. Thereafter complainants moved for a rule on defendants to show cause why they should not be attached for contempt of court for failure to comply with the order of April 30, 1921. The rule was granted and on May 27, 1921, defendants filed their answer, giving as a reason for their failure to comply with the order, substantially the same argument that was set forth in the answer filed. The case was again heard by the court upon the rule to show cause and the answer of defendants thereto, and on June 28, 1921, the court entered its order finding that it had jurisdiction of the parties and the subject-matter, reciting the prior proceedings in the case, and finding defendants in contempt of court for their failure and refusal to comply with the order of April 30, 1921, and imposing the fine hereinbefore mentioned.

As grounds for a reversal of this order, defendants insist that the order requiring them to answer the interrogatories is in effect granting to complainants an accounting before the court has determined whether or not complainants are entitled to such an accounting and that no accounting should be required until complainants have first established their right to it, citing Ligare v. Peacock, 109 Ill. 94; Rhodes v. Ashurst, 176 id. 351; and Barnes v. Barnes, 282 id. 393, and other authorities which support the general proposition that an accounting will not be ordered until the right to it has been established.

The interrogatories which appellants have refused to answer call for information which could be frunished only by defendants, as to the amount of income derived from the buildings,

the expenditures made by defendants in their maintenance and operation, the amount due for coal from the complainant Herbert M. Dunemann to them or the George Lill Coal Company, all of which were pertinent to the determination of whether or not complainants were entitled to an accounting. An answer to these interrogatories cannot be regarded as an equivalent to granting to complainants the accounting for which they prayed. The information sought was in the nature of a discovery, and while it might or might not be a basis for granting the relief sought, it was not the relief contemplated by the prayed of the bill.

The procedure followed by the trial court seems to have been in strict compliance with the requirements of the statute, which provides as follows:

> "When an answer shall be adjudged insufficient, the defendant shall file a further answer within such time as the court shall direct, and on failure thereof, the bill shall be taken as confessed; if such further answer shall be likewise adjudged insufficient, the defendant shall file a supplemental answer, and pay all costs attendant thereon; and if that shall be adjudged insufficient, the defendant may be proceeded against for a contempt, and the like proceedings be had thereon, to enforce the order of the court, as in other cases of contempt." Sec. 24, chap. 22, R. S.

The action taken by the court was authorized by the provision quoted. Defendants had filed a second answer, to which the court had sustained exceptions, and an order had been entered requiring defendants to file a further and sufficient answer which also had been adjudged insufficient. The case could not be put at issue until a full and complete answer had been filed. There is no merit in the contention of appellants that by answering the interrogatories complainants would be receiving the relief prayed by the bill. The order of the court for defendants to file a further answer is properly enforced by contempt proceedings. Fairfield v. Baumann, 297 Ill. 347. It was encumbent upon defendants to file a full and complete answer. Hopkins v. Medley, 97 Ill. 402.

The administrator moves by affidavits to dismiss malfeasance and misfeasance, the answer does not deal (see the respondent's filing 8). Questions of time or the courts 1221 and 1222, all of which were preliminary to the determination of whether or not administrator were entitled to an injunction. It seems to these interrogatories cannot be required as an essential to proceeding to consideration the merits for which they prayed. The plaintiffs therefore ask the admission of a discovery, and while it might be right to insist that be a basis for granting the relief sought, it was not the relief contemplated by the drafters of the 1221.

The provisions relevant to the trial court seem to have been in strict conformity with the requirements of the statute, which provides as follows:

> "When an answer shall be adjudged insufficient, the relationship shall file a further answer within such time as the court shall direct, and on failure thereof, the 1221 shall be taken as confessed; if such further answer shall be filed as aforesaid insufficient, the relationship shall file a supplemental answer, and may make affidavit thereof, and if this shall be adjudged insufficient, the information may be prosecuted upwards for a contempt, and the same proceedings be had thereon, as in cases the order of the court, or in other cases of contempt." Sec. 14, chap. 77, R. S.

The action taken by the court was authorized by the statutes quoted. Information was filed; a general answer, to which the court had sustained exceptions, and an order has been entered requiring defendants to file a further and sufficient answer which also has been adjudged insufficient. The time allowed not to exceed six days until a full and complete answer has been filed. The is no merit in the contention of appellants that by answering the interrogatories propounded would be providing the relator proof for the 1221. The burden of the suit for defendant, is filed a further answer be properly entered by reasons stated.

Reversed v. Dunham, 187 111. 447. In was considered upon interrogatories, the filed a full and complete answer. Dunham v. People, 87 111. 401.

It is undisputed that the superior Court had jurisdiction of the subject-matter of the case and the parties thereto. The order of April 30, 1921, directing the defendants to make a full and complete answer to the bill was not void. Even if it would be regarded as erroneous, it is not subject to collateral attack in a contempt proceeding arising from a refusal to obey it. Lyon & Healy v. Piano Workers' Union, 289 Ill. 176. A defendant may refuse to obey an order where the court had no authority to make it and where it is absolutely void for want of power in the court, but he cannot rightfully refuse to obey it on the ground that it was improvidently or erroneously made. Christian Hospital v. The People, 223 Ill. 244. The judgment of the court is not subject to collateral attack. Clark v. Parks, 163 Ill. 334. This rule has been recognized by so many decisions of our Supreme Court that it is no longer subject to debate.

The decree of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

316 - 27274

HERMAN H. HETTLER LUMBER COMPANY, a corporation, HARRY K. CRAFTS and HELEN C. JOB, sole heirs at law of CLAYTON E. CRAFTS, deceased, Appellees, vs. ARCHIBALD G. HODGE et al., ON APPEAL OF A. E. SUNDSTROM, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

225 I.A. 665

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The bill of complaint in this case was filed February 23, 1917, by Herman H. Hettler Lumber Company to enforce a mechanic's lien upon certain real estate. It is alleged that complainant was a sub-contractor under the defendant A. E. Sundstrom, the original contractor for the carpentry work. No controversy is presented as to the rights of complainant.

The defendant Sundstrom filed his answer May 4, 1917, which was in the nature of an intervening petition, claiming a mechanic's lien upon the premises in question as the original contractor under a written contract with the owner for the carpentry work on a proposed apartment building. The agreed contract price was $20,500. The answer further alleged fulfilment of the contract by Sundstrom, and that there was due him, after the allowance of all just credits, the sum of $5,619.30, for which amount he had filed his claim for a lien. The answer prayed that it be regarded as a cross bill and that Sundstrom be decreed to be entitled to a lien. The answer of the owner denied all material allegations and alleged, as a matter of defense, that Sundstrom on August 22, 1916, for a valuable consideration, agreed to complete his contract for a further payment of $13,500, and upon receipt of such payment to release and

waive any lien which he might have against the premises, and that Sundstrom had received since said date an amount in excess of $13,800 upon the contract. Other answers were filed, some of them in the nature of intervening petitions by lien claimants. The case was referred to a master in chancery, whose report found that Sundstrom had waived his right to a lien, and recommended that his intervening petition be dismissed. The report was approved by the court and a decree entered accordingly.

No question as to the sufficiency of the proceedings taken by Sundstrom to bring himself within the provisions of the Mechanic's Lien Act is raised. It fully appears that his statement of claim and pleadings were sufficient in law and filed in ample time. The only question presented for review, is whether under the circumstances shown, the instrument executed by Sundstrom on August 22, 1916, together with the payment therein mentioned, operated as a waiver of any right of lien which Sundstrom otherwise would have had. If this issue is decided in the affirmative, it will be unnecessary to consider other questions raised as to the amount to which Sundstrom is entitled.

The master's report, among other things, found that Sundstrom had received from the proceeds of the loan upon the building, the sum of $13,520, in addition to other payments amounting to $3141.70; that on August 10, 1916, Sundstrom signed a receipt for $7,000 without having actually received any part of said sum as shown by memorandum in writing dated September 14, 1916, signed by the owner of the building, from which it appears that the receipt was a fictitious instrument, given solely for the purpose of enabling the owner to secure payments upon his building loan. The master's report further found that on August 22, 1916, Sundstrom delivered to the loan agent the following instrument, to-wit:

"To whom it may concern:

For and in consideration of the sum of One Dollar and other good and valuable considerations in hand paid, the receipt whereof is hereby acknowledged, I, the contractor for the carpentry work on the building now in course of construction at S. W. cor. Waller Ave. and Race St. hereby agree to complete said contract on said building, according to the plans and specifications submitted to C. W. Mitchell & Co., and further agree that as soon as the further sum of $13,500.00 is paid or tendered to me to release and waive any lien which I may now or hereafter have against said building."

This writing was under seal and was executed by Sundstrom on the day it bears date. It is undisputed that it refers to the building upon which Sundstrom now claims a lien, and that he subsequently received on account of his contract the sum of $13,500 therein mentioned.

It is contended by appellant that there was no waiver on the part of Sundstrom of his right to a lien; that such a waiver of a mechanic's lien is essentially a matter of intention, and that it was the intention of Sundstrom in executing this instrument and of the owner in procuring the same to effect an arrangement whereby the owner would be enabled to secure disbursement of the building loan which he had negotiated upon the premises, and that the only effect of this agreement was by way of estoppel as to the lien of the loan obtained from Mitchell. In other words, this agreement of August 22, 1916, is to be regarded as to everyone except the mortgagee, as a colorable transaction of the same character as the receipt of August 10, 1916, whereby Sundstrom acknowledged receipt of the sum of $7,000.

We cannot agree with this contention, and must construe the instrument of August 22, 1916, to mean exactly what it says. There is nothing upon its face indicating that a waiver was contemplated as to the Mitchell loan only. While we are not called upon in this proceeding to pass upon the rights of the mortgagee and the respective rights of the parties other than Sundstrom and the owner, we are not impressed with an argument based upon the

theory illustrated by the fictitious receipt for $7,000, dated August 10, 1916, or the limited meaning of the instrument of August 22, 1916. After the latter instrument had been executed and delivered and the payment of $13,500 therein specified had been made, nothing further remained to be done by Sundstrom to carry his agreement into effect except the actual execution of a lien waiver. Appellee relies upon the case of Turner v. Brackle, 349 Ill. 394, which involved a contract for masonry work payable as the work progressed. The contractor executed and delivered to the mortgagee a document which recited, in substance, that when the contractor received the sum of $7800 without further act, the document should constitute a full and complete waiver and release of any and all lien or claim or right of lien. (p. 398)

The court found that the instrument was not ambiguous and its language clearly indicated an intention to waive the right to a lien upon payment of the sum mentioned. The contention was made that the release was for the purpose of establishing the priority of the mortgage over the lien claim, just as in the case at bar, and the court held that if such intention had been clearly expressed, the operation of the release would have been so limited, but that where a general waiver was executed and there was nothing in the context to show a contrary intention, the contract must be enforced as the parties made it. It is true that the phraseology of the instrument involved in the Turner case differs slightly from that used in the document of August 22, 1916, involved herein, and did not require the execution of any further instrument on the part of the lien claimant. We do not regard this as material, for the reason that equity regards that as done which ought to have been done. Nedalski v. Nedalski, 101 Ill. App. 158. This is a favorite maxim of equity and is said to be the foundation of all distinctively equitable property rights, estates and interests. 21 C. J. 200. Upon the payment of $13,500 to Sundstrom upon his contract, it

became his duty to execute a waiver of his right to a lien, and he cannot be permitted to urge his failure to comply with the terms of his agreement as a reason for avoiding the agreement. We are satisfied with the conclusion of the trial court upon this subject.

The decree of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

346 - 27304

JOSEPH PIKORA,
Appellee,

vs.

ROYAL NEIGHBORS OF AMERICA,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

225 I.A. 665

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This action was brought by Joseph Pikora, as beneficiary, upon a fraternal beneficiary certificate issued by appellant upon the life of Elizabeth Pikora, the wife of plaintiff. There have been two trials of the case in the Superior court of Cook County, in each of which there was a verdict and judgment in favor of plaintiff. There was an appeal to this court from the first judgment, which was reversed and the case remanded on account of errors of the trial court in ruling upon questions of evidence and in giving certain instructions. Pikora v. Royal Neighbors, 220 Ill. App. 660. The present appeal is from a judgment for $1,000, the amount of the certificate, resulting from the second trial.

Our former opinion, rendered December 31, 1920, contains a full statement of the pleadings, in which there has been no change since the first trial, and a complete outline of the testimony, which is substantially the same as upon the second trial, with the exception that certain features which were found objectionable upon the first trial are not contained in the present record. We therefore deem it unnecessary to furnish a review of the pleadings and evidence, which would be only a repetition of what was stated fully in our former opinion, to which we refer.

The sole defense to the action is based upon a provision of the by-laws of defendant to the effect that the certificate shall

be absolutely null and void and all liability thereon extinguished if the death of the member "results from criminal or self-inflicted abortion or miscarriage or any attempt thereat." The same condition is embodied in the certificate and the insured agreed to it in her written application for membership in the defendant society. The plea aver that the death of Elizabeth Pikora resulted from a criminal or self-inflicted abortion or miscarriage or an attempt thereat.

The evidence upon this issue of fact is conflicting. On the part of the defendant it consists of the testimony of two attending physicians as to certain admissions made by decedent just prior to her death to the effect that she had committed or attempted to commit an abortion by the use of a sharp stick. That the decedent made the statements attributed to her is denied by another equally credible witness, who was present and within hearing at the time. There was also some testimony as to a conversation between one of the physicians and plaintiff as to a certain stick found upon the premises, which was supposed to have been the instrument with which the criminal act was committed. This testimony does not aid defendant's contention materially, as the stick in question was not identified sufficiently to permit its receipt in evidence, and for the further reason that there is a conflict of evidence as to what the husband said at that time.

While the medical testimony fairly tends to prove that the cause of death was septicaemia resulting from an abortion, there is no evidence, other than that above mentioned, tending to prove that such abortion was self-inflicted or criminal. It is undisputed that septicaemia might have been caused by other conditions and that there may be an abortion which is not criminal or self-inflicted.

Under these circumstances we are not justified in holding that the verdict and judgment were manifestly against the weight of the evidence to such an extent as to warrant a reversal of the judgment.

The judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

387 - 27345

IN RE ESTATE OF JOHN W. WALKER, deceased.

WILLIAM L. MARTIN, individually and as administrator of said estate,

Appellant,

vs.

LOUIS C. COYNER, administrator de bonis non of estate of JOHN W. WALKER, deceased,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

225 I.A. 665

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County overruling the motion of appellant to vacate an order dismissing his appeal from an order of the Probate Court. The appeal from the Probate Court was dismissed by the Circuit Court February 28, 1921. The motion to vacate said order was made within the term at which the order of dismissal was entered. The only question involved in this appeal is, whether or not there should be a trial in the Circuit Court to determine upon their merits, the questions involved in the settlement of this estate.

The record shows that the appeal from the Probate Court to the Circuit Court was from an order of the former court entered July 2, 1920, which recited that on or about April 14, 1916, the appellant was removed as administrator of said estate and Louis C. Coyner was appointed administrator de bonis non and had qualified in that capacity; that by the same order appellant was directed to file a final account of his proceedings as administrator of said estate within ten days; that the said William L. Martin, as administrator, appealed from said order of April 14, 1916, to the Circuit Court and to the Appellate Court for the

IN RE ESTATE OF JOHN H. WALTON,
Deceased.

CLELLIA L. WALTON, individually
and as administratrix of said
estate,

Appellant,

vs.

LELIA L. COPPOC, administratrix
of Jessie Ann of estate of John H.
Walton, deceased,

Appellee.

APPEAL FROM
FIRST DIST.
FULL COURT.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County overruling the motion of appellant to remove an order dismissing his appeal from an order of the Probate Court. The appeal from the Probate Court was dismissed by the Circuit Court January 22, 1940. The motion to vacate that order was made within the term at which the order of dismissal was entered. The only question involved in this appeal is, whether at that time there should be a trial in the Circuit Court to determine upon their merits, the questions involved in the validity of this estate.

The record shows that the appeal from the Probate Court to the Circuit Court was from an order of the former court entered July 7, 1939, which recited that on an issue tried it, 1940, the impleaded not proved be administrator of said estate and Lelia L. Coppoc was appointed administratrix de bonis non and qualified in that capacity; that by the same order appellant was directed to file a final account of its proceedings in administration of said estate within ten days; that the said Lelia L. Coppoc, as administratrix, appealed from said order of July 7, 1939. In the Circuit Court and in the Appellate Court for the

First District of Illinois, both of which courts affirmed the order of the Probate Court. The court further found in said order that appellant filed in the Probate Court an account current in July, 1916, showing that he had received as administrator personal property consisting of a stock of goods in a store located at No. 10 East Twenty-sixth street, Chicago, which said property had been appraised by appraisers appointed by the Probate Court at $648.84; that he had collected cash amounting to $449.79, making a total amount received of $1098.63; that he had paid to the widow of the decedent the sum of $10; that he had paid for a certified copy of letters of administration $1, and that on July 18, 1919, he had deposited with the Clerk of the Probate Court the sum of $250, for which respective sums he was entitled to credit, and the court found that the net amount of assets in the hands of the administrator was $837.63, for which appellant was liable to his successor in office, and it was ordered that appellant turn over to the administrator de bonis non said sum of $837.63, with interest at the rate of five per cent per annum from February 8, 1916, within ten days from the date of the entry of the order. The evidence upon which the order of July 9, 1920, was based is not shown in the record. We infer that it has not been preserved.

An affidavit in support of the motion to vacate the order of February 28, 1921, was made by appellant, alleging that he had filed his final account as administrator June 18, 1919. The affidavit does not allege that the account was approved by the court, but on the other hand, indicates that it had not and could not have been so approved. In his affidavit appellant set forth the account which he claimed to have filed June 18, 1919. This account, so far as the amounts involved therein are concerned, is identical with the statement of receipts and disbursements as found by the Probate Court in its order of July 9, 1920, with the single exception that appellant claims credit for the sum of $197, claimed to have been

first District of Illinois, both of which courts affirmed the order of the trial court. The court further found in this order that appellant filed in the Juvenile Court on January 19, 1942, somewhere that he had received an administrator petition priority consisting of a bond of people in a place located at 5a. in Cook County, Illinois, which also apparently had been approved by appellees appointed by the Probate Court on [illegible] that he had delivered such appointing on Jan.19, making a total amount received of $1479.00; that on Jan 21 to the date of the hearing the sum of $50; that he had paid for a petition for letters of administration $5, and that on July 13, 1942, he had deposited with the Clerk of the Juvenile Court the sum of $100, for which respective sums he was entitled to credit, and the court found that the net amount of cash in the hands of the administrator was $1317.00, for which appellant was liable to his successor in office, and it was ordered that appellant turn over to the administrator in cash the sum of $1317.00, with interest at the rate of 5% per annum from February 2, 1944, within ten days from the date of the entry of the order. The evidence upon which the order of July 6, 1944, was based is not shown in the record. It infer that it has not been preserved.

An affidavit in support of the motion to vacate the order of February 22, 1944, was made by appellant, alleging that he had filed his final account as administrator June 14, 1942. The affidavit does not allege that the account was approved by the court, but as the order found, indicates that it had or was could not have been so approved. In his affidavit appellant set forth the amount which he claimed to have filed June 14, 1942. This amount, so far as the matter involved herein are concerned, is inconsistent with the statement of receipts and disbursements as found by the Juvenile Court in its order of July 6, 1944, with the single exception that appellant claims credit for the sum of $147, without to have been

paid by him for the funeral expenses of the decedent. A large portion of appellant's affidavit is devoted to a narration of his difficulties in finding this account in the files of the Probate Court, which seems to be immaterial, in view of the fact that with the single exception above noted, his statement of receipts and disbursements is the same as that embodied in the order of the Probate Court. Appellant also charges in his affidavit that he was compelled over his protest, by the Judge of the Probate Court, to inventory the goods and chattels in the store above mentioned, which he claims never came into his possession as administrator, and further, that he was ordered by the Probate Court not to take charge of them.

While this affidavit is in some respects almost incredible, and while we cannot say that either it or the affidavit of appellant's attorney in support of the motion to vacate the order of dismissal show either diligence or merit, yet the fact remains that so far as is shown by the record before us, there has never been any hearing upon the merits for the determination of the ownership of the goods and chattels in the store. The evidence does not show whether they were properly charged to appellant or actually belonged to decedent's father, as he claims. The further question as to whether or not appellant is entitled to credit for the payment of the funeral expenses of decedent does not appear to have been definitely determined, as admitted by counsel for appellee. The record does not show that appellant has converted these goods to his own use. It does not show the character of the goods, whether perishable or otherwise, or their present location. There is no evidence before us of any effort on the part of the administrator de bonis non to obtain possession of these goods since the disposition of the former appeal.

Appellant was entitled to have the order of July 2,

paid by him for the tonnage expenses of the movement. A large portion of appellant's attempt is devoted to a narration of his difficulties in finding this unusual in the light of the foreign funds, which seems to be immaterial, in view of the fact that with the simple exception that author, his treasurer or manager and stockholders in the case so that authorized in the order of the Tenth Court. Appellant also charges in his affidavit that he was committed over his protest, by the judge of the Tenth Court, to inventory the goods and chattels in the store above mentioned, which he claims never came into his possession as administrator, and further, that he was ordered by the Tenth Court not to sell goods of them.

While this affidavit is in some respects almost incredible, and makes we cannot say that either it or the affidavit of appellant's attorney in support of the motion to vacate the order of dismissal show either diligence or merit, yet the fact remains that so far as is shown by the record before us, there has never been any hearing upon the merits for the extraordinary of the grounds and matters in the case. The affidavits have not been searched by our judicial tribunal, in the light, the further question of the effect of not appellant's failure to obtain the payment of the Tenth appellants in order for the payment of the Tenth appellants have not appeared to have been intentionally delayed, or omitted by counsel for appellee. The record does not show that appellant has involved funds goods in his own use. It does not show the character of the goods, nor does particularly or expressly, or their present location. There is no evidence before us of any effort on the part of the administrator in Tenth Court to obtain possession of these goods after the disposition of the former action.

Judgment was entered in Dec. the error of this k.

1920, reviewed by the Circuit Court, and in view of the circumstances above mentioned, we do not think that the ends of justice were subserved by a dismissal of the appeal without a hearing and determination upon their merits of the questions above indicated, which must be settled in order to ascertain the extent of appellant's liability, if any, for his acts or omissions as administrator of said estate.

The order of the Circuit Court is reversed and the case remanded with directions to vacate the order dismissing the appeal from the Probate Court.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

387 - 27345

IN RE ESTATE OF JOHN W. WALKER, deceased. WILLIAM L. MARTIN, individually and as administrator of said estate, Appellant, vs. LOUIS C. COYNER, administrator *de bonis non* of estate of JOHN W. WALKER, deceased, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County overruling the motion of appellant to vacate an order dismissing his appeal from an order of the Probate Court. The appeal from the Probate Court was dismissed by the Circuit Court February 28, 1921. The motion to vacate said order was made within the term at which the order of dismissal was entered. The only question involved in this appeal is, whether or not there should be a trial in the Circuit Court to determine upon their merits, the questions involved in the settlement of this estate.

The record shows that the appeal from the Probate Court to the Circuit Court was from an order of the former court entered July 2, 1920, which recited that on or about April 14, 1916, the appellant was removed as administrator of said estate and Louis C. Coyner was appointed administrator *de bonis non* and had qualified in that capacity; that by the same order appellant was directed to file a final account of his proceedings as administrator of said estate within ten days; that the said William L. Martin, as administrator, appealed from said order of April 14, 1916, to the Circuit Court and to the Appellate Court for the

397 - 27385

ARTHUR MEYER, a Minor, by E. J. MEYER, his Father and Next Friend,
Appellee,

vs.

CITY OF CHICAGO, a Corporation, and SANITARY DISTRICT OF CHICAGO, a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

225 I.A. 6654

MR. JUSTICE MOORILL DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for personal injuries brought on behalf of a minor by his father and next friend against the City of Chicago and the Sanitary District of Chicago. The injuries are alleged to have been caused by the minor coming in contact with an electric light wire owned by the city and used for the purpose of supplying current to the city's arc lights. The case was subsequently dismissed as to the Sanitary District. The verdict and judgment were for $10,000. The city offered no evidence in defense and moved for a directed verdict and later for a new trial, both of which motions were denied. It is contended by the City of Chicago that there is no evidence of its negligence in the maintenance and operation of its wire; that the wire did not constitute an attractive nuisance and that the minor was guilty of contributory negligence.

In the first count of the declaration it is alleged, in substance, that the city negligently permitted a certain electric wire, carrying a high voltage of electricity, to be suspended over and above the east side of Albany avenue between Schubert and Logan boulevards in said city, the wire passing through or in close proximity to the branches of a tree in the street, and that the boy, in climbing the tree, came in contact with the wire and received a charge of electricity which caused the injuries in question. The

second count in substance charges defendant with negligence in failing to insulate and otherwise protect the said wire. The third count, with varying phraseology, alleged the facts and conditions under which the accident occurred substantially as above stated. The fourth count is based upon the theory that the wire was an attractive nuisance. A plea of the general issue was filed by the city.

The evidence shows that the City of Chicago maintained two electric arc light wires stretched along the east side of Albany avenue supported upon wooden poles set in the parkway between the curbstone and sidewalk; that in front of the premises at 2641 Albany avenue there was a large poplar tree growing in the parkway, the foliage of which surrounded the wires; that the wires at the time of the accident carried approximately 4,000 volts of electricity; that on the evening of June 16, 1915, the minor, who was then ten years of age, climbed the tree and thereafter fell from his position, and that while so falling he grasped one of the electric wires, from which he received severe burns upon his left hand and foot, rendering it necessary to amputate three of the fingers and perform other surgical operations. The injuries were of a serious and permanent character. It is unnecessary to describe them more explicitly, as no contention is made that the judgment was excessive in amount.

The facts and circumstances involved in this case are almost identical with those in the case of Budil v. City of Chicago, number 26055, decided by this court October 4, 1921, in which a petition for writ of certiorari has been denied. Our decision in that case must control the determination of the case at bar. The proof showed that the boy received the electric current by coming in contact with the wire while he was in the tree. The tree was on a public street between the sidewalk and the roadway. The boy

had the right to play in the street, and it is natural and not unusual for a boy to climb a tree. Such conduct is to be anticipated under like circumstances. Defendant was therefore negligent in not anticipating the necessity of protecting or guarding the wire against the danger of accident. A city is bound to know the dangers incident to lighting its streets with electricity and must guard against accidents by the exercise of a degree of care commensurate to the danger. Siedwell v. City of Chicago, 207 Ill. 486. There is no evidence of contributory negligence on the part of the minor.

The judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

409 - 27367

PETER M. CLAUSSEN and EMIL RASMUSSEN,
Appellees,

vs.

ANNA FANNIER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 666

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal court of Chicago to recover possession of the premises located at numbers 3813-1815 Greenview avenue, Chicago, in which judgment was rendered in favor of plaintiffs April 26, 1921.

The evidence shows that the premises were devised by the owner, one Joseph Weissenreider, to one Hellmuth A. Gross and one Frank F. Fannier, who was the son of defendant, by a written lease dated October 24, 1919, for a term commencing November 1, 1919, and ending October 31, 1920, at a rental of $40 per month. The lease also provided, in substance, that the lessee should have the option of extending the lease for a period of three years from November 1, 1920, at a monthly rental of $50 for the first year, $60 for the second year and $65 for the third year of the extended term. This option was exercised and the rental was paid by said Frank F. Fannier up to and including February, 1921. On March 8, 1921, a five day notice and demand for rent was served upon defendant, Anna Fannier, signed on behalf of plaintiffs by certain agents. Thereupon Frank F. Fannier, in company with one Veckelin, who was a witness in the case and corroborated Fannier's testimony upon the subject, tendered the rent and demanded that he be given the usual receipt therefor, in his name, as had been done on many previous occasions. The agent refused to accept the rent except upon the condition that a

receipt be given, made out to his mother, Anna Fannier, the defendant. The tender was kept good in court. These facts are undisputed.

The lessor of the premises, Joseph Weissenreider, testified upon the trial that his grandson, one Kieck, had owned the property since June, 1920, and held the legal title thereof, although rent had been paid to the witness during the whole period. No competent evidence of this transfer was furnished and none showing that the tenant was ever advised of the transfer or that the lessor's interest in the lease was ever assigned to Kieck. The only interest which plaintiffs have in the property is under a certain agreement dated March 1, 1921, whereby Kieck and his wife agreed to sell the premises in question to plaintiffs upon certain terms therein set forth. There is no evidence that this contract was ever consummated or that plaintiffs have any title to the real estate in question.

The evidence fails to show that plaintiffs have any right to the possession of the premises or that defendant Anna Fannier ever was in possession thereof, except as an agent of her son in conducting the candy and soft drink business which the latter operated upon the demised premises. It is contended on behalf of appellees that Weissenreider was unable to read, write or understand English, and that he did not know the contents of the lease which he had executed and delivered to Frank J. Fannier, but there was ample testimony to the effect that at the time of the execution of the lease the document was read to him in the German language and that he thoroughly understood the transaction.

The judgment of the Municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

459 - 27367

FINDING OF FACTS.

The court finds as ultimate facts in this case that there are no contractual relations between plaintiffs and defendant herein, and that defendant did not unlawfully withhold possession of the premises in question.

439 - 27397

PACIFIC LUMBER CO., a Corporation,
Appellee,

vs.

CHICAGO TOY WORKS, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

22 - A 256

MR. JUSTICE McMILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1515.83 entered by the Municipal court of Chicago upon a directed verdict. The suit was brought upon an account stated for lumber sold and delivered by plaintiff to defendant. Defendant contended that the lumber was sold for the purpose of being used in the manufacture of toys and that plaintiff knew of the intended use to be made of it; that the lumber was not fit for such use and that therefore plaintiff is precluded from a recovery upon the ground of the breach of an implied warranty that the goods should be reasonably fit for the purpose intended. A reversal is sought upon this ground.

We find no evidence in the record tending to sustain defendant's contention. The evidence shows that the transaction originated with written orders from defendant to plaintiff for the shipment of the lumber in question; that the lumber was delivered as ordered and no objection was made to the same except that on the occasion of one interview regarding the matter, defendant requested plaintiff to take back certain inch and a half lumber included in the order. Plaintiff complied with this request and gave to defendant a credit of $498.05 upon the account.

There was no testimony that the lumber was not as ordered or that it had not been used or that it had ever been tendered

back to plaintiff, with the exception of the sizes above mentioned. Repeated statements of the account were sent by plaintiff to defendant and no evidence was offered or received that any objection had ever been made to the account, as stated.

Under these circumstances the court was justified in directing a verdict for plaintiff for the amount of the balance due on the account. Numerous statements of the account having been received and retained by defendant without objection to any of the items, the defendant must be regarded as having waived all objections, if it ever had any. Furlinger v. Michinson, 153 Ill. App. 36. There was an implied promise on the part of defendant to pay the balance. Dick v. Zimmermann, 207 Ill. 636.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

451 - 27409

EMMA ANDERSON,
Appellee,

vs.

ELLEN GILMARTIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of plaintiff in an action of forcible detainer brought on May 13, 1931, to recover possession of the premises described in the complaint, known as flat No. 3 on the third floor of the building at 1420 Thome avenue, Chicago. Defendant was in possession under a lease from the former owner to her for a term commencing May 1, 1919, and ending April 30, 1920, subject to the following stipulation, to-wit:

> "Provided sixty days written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease, including all covenants and conditions therein, shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates by mailing said notice to the within mentioned premises addressed to said lessee."

The lessor's interest had been assigned to plaintiff, as shown by the endorsements upon the lease. The lessee held possession after May 1, 1931. A sixty day notice of termination dated January 18, 1931, was served upon appellant by leaving a copy with appellant's daughter. The receipt of this notice is admitted. The notice informed defendant that the lease in question would be terminated on April 30, 1931, and that it was given pursuant to the provision for a sixty day notice contained in the lease.

It is contended on behalf of appellant that the finding of the trial court does not accurately describe the premises. The

count found defendant guilty of unlawfully withholding the premises described in the complaint, which was a sufficient identification of the premises. It is also contended by appellant that the sixty days notice was inadmissible because served on the daughter of defendant instead of having been mailed to the lessee. No objection was made by appellant upon the trial to the introduction of the notice on account of the manner in which it was served. Defendant admitted receiving the notice more than sixty days prior to the termination of the lease. We do not regard it as material that the notice was served by delivery upon the premises instead of by mail. The notice was not misleading and gave the necessary information to the proper parties. Its receipt was admitted and an objection as to the manner of service cannot now be considered. Thomasson v. Wilson, 146 Ill., 384.

It is also urged by appellant that there was no evidence offered of the assignment of the original lessor's interest in the lease. It is a sufficient answer to say that the lease with the assignments endorsed thereon was received in evidence.

It is also asserted by appellant that the action should have been brought by plaintiff as assignee. There is no merit in this contention. An application for a stay of execution under the so-called Lessinger Act was granted by the court and the writ was stayed until August 1, 1921.

The judgment of the Municipal court is fully sustained by the evidence and is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

475 - 27435

LOUIS J. STOLLOF,
Appellee,

vs.

N. ELENBOGEN, Doing Business as N. Elenbogen & Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 668

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was rendered by the Municipal court of Chicago in favor of plaintiff for $67 and costs after a trial before the court without a jury. The action was brought for the recovery of $125, paid by plaintiff on March 16, 1914, for the transportation of two persons from Lithuania to Chicago via the White Star Dominion Line, of which defendant was agent for the sale of tickets. No brief is filed on behalf of appellee.

Thereafter plaintiff notified defendant that on account of war conditions then existing, the persons for whom the transportation had been purchased were unable to travel and asked for the cancellation of the tickets. Defendant agreed that he would cancel the tickets and return to plaintiff whatever amount he received from the steamship company as a refund. The sum of $67.10 was received by defendant from the steamship company and he delivered this amount to plaintiff May 18, 1917. Plaintiff never made any demand for any money since the receipt of the $67.10 until the trial of the case. The balance of the money paid for the ticket was $57.90. No explanation is given of the theory upon which the court rendered judgment for $67. It is apparent that defendant was acting as an agent for the steamship company and did not personally retain any part of the funds which he received in payment for the tickets. It was well known to plaintiff that defendant was acting as such agent. Plaintiff had no right of action against defendant.

The judgment of the Municipal court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

475 - 27433

FINDING OF FACTS.

The court finds as ultimate facts that defendant was acting solely as an agent of the steamship company in selling the tickets in question to plaintiff and that plaintiff knew at the time of the sale that defendant was acting as such agent.

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